REPORTS
AND
CASES
OF
LAVV:

Argued, and adjudged in the COURTS of LAW,
at WESTMINSTER.

In the Time of the late

QUEEN ELIZABETH,

From the 18th. to the 33th. year of her Reign.

Collected by a Learned Profeſſour of the LAW,

WILLIAM LEONARD, Eſquire,
Then of the Honourable Society of GRAYS-INNE.

Publiſhed by *Will. Hughes* of *Grays-Inne*, Eſq.

With Alphabetical Tables of the Names of the Caſes, and of the Matters contained in the BOOK.

BIBL. CODR. COLL. OMN. ANIM. OXON.

LONDON,

Printed by *Tho. Roycroft*, for *Nath. Ekins*, and are to be ſold at his Shop, at the Gunn in St. *Paul*'s Church-yard, 1658.

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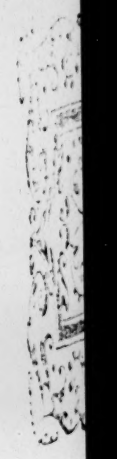
TO THE READER.

COURTEOUS READER,

THeſe Caſes were Collected, and taken in the *French* Tongue, by *William Leonard* Eſquire, ſometimes of the Honourable Society of *Grays-Inne*; a Learned Profeſſor, and Practiſer of the Common Law, in the time of the Reign of the late Queen *Elizabeth*. One Copy of ſome of theſe Caſes (many years paſt) came into the hands of Sir *Robert Hitcham* Knight, afterwards Serjeant at Law; another Copy of other of theſe Caſes came then into the hands of *Humphrey Davenport* Serjeant at Law; afterwards Sir *Humphrey Davenport* Knight, late Lord Chief Baron of the Court of *Exchequer*: Both which ſaid learned perſons approved of them, and made uſe of them in the courſe of their ſeveral Practice. Some other Copies of ſome of theſe Caſes are now diſperſed abroad, and are in the hands of divers Practiſers, and Students of the Law, who make the like uſe of them. The Originals themſelves of all theſe Caſes (amongſt many others of the ſaid Mr. *Leonard*'s collecting) all of them under his own hand-writing, are now in my hands, having been delivered to me by a Worthy Gentleman of the ſame Society of *Grays-Inne*, who had them out of the Library, ſometimes belonging to the ſaid Mr. *Leonard*. Theſe Caſes, having been lately, truly, and carefully Tranſlated by me out of the Original *French* Copy into *Engliſh*, have ſince the Tranſlation thereof been peruſed, and approved of by many Eminent Profeſſours of the Law. Wherefore I, finding that the ſame do contain many excellent Matters, and Points of Law, which have not heretofore been Printed, or Publiſhed, do here offer the ſame unto thy Judgment upon a ſerious conſideration, hoping they may be of ſome uſe, and benefit to thee, in the like courſe of thy ſtudy, and practice of LAVV.

From my Study at *Grays-Inne*,
Novemb. 20th. 1658.

Will. Hughes.



The Names of the Learned Lawyers, Serjeants at Law, and Judges of the ſeverall Courts at Weſtminſter, who argued the Caſes, and were Judges of the ſeverall Courts, where the Caſes were argued.

viz.

A

ANderſon, Lord Chief Juſtice of the Common Pleas.

Anger.

Altham, afterwards one of the Barons of the Exchequer.

Atkinſon.

Ayliffe, Juſtice of the Kings Bench.

B.

BEamount, Serjeant atlaw, afterwards Judge of the Common Pleas.

Bromley, Lord Chancellour of *England.*

Barkley.

C.

COok, after Lord Chief Juſtice of the Common Pleas.

Clench, one of the Judges of the Kings Bench

Cooper, Serjeant at Law.

Clark, Baron of the Exchequer.

D.

DAniel, Serjeant at Law, after Judge of the Common Pleas.

Drew, Serjeant at Law.

Dyer, Lord Chief Juſtice of the Common Pleas.

E.

EGerton, Sollicitor of the Queen, after Lord Chancellor.

F.

FLeetwood, Serjeant at Law, Recorder of *London.*

Fuller.

Fenner, Serjeant at Law, after Judge of the Kings Bench.

G.

GAwdy, Judge of the Kings Bench.

Golding, Serjeant at Law.

Glanvile, Serjeant at Law, after Judge of the Common Pleas

Gent, Baron of the Exchequer.
Godfrey.

H.

Haughton, Serjeant at Law, after Judge of the Common Pleas.
Hammon, Serjeant at Law.
Harris, Serjeant at Law.
Heale, Serjeant at Law.
Hobart.

K.

Kingsmill, Judge of the Kings Bench.

L.

Laiton.

M.

Mead, Serjeant at Law, after Iudge of the Common Pleas.
Morgan.
Manwood, Lord Chief Baron of the Exchequer.
Mounson, Iustice of the common Pleas.

O.

Owen, Serjeant at Law, after Baron of the Exchequer.

P.

Popham, Attorney Generall of the Queen, after *Lord* Chief Iustice of *B.R.*
Periam, Iudge of the Common Pleas.
Pepper, Attorney of the Court of Wards.
Plowden.
Puckering, the Queens Serjeant at *Law*.

R.

Rhodes. Iudge of the Common Pleas.

S.

Snag, Serjeant at *Law*.
Shuit, Iudge of the Kings Bench.
Shuttleworth, Serjeant at *Law*.

T.

Tanfield, Serjeant at law, after *Lord* Chief Baron of the Exchequer.
Topham.

W.

Wray, *Lord* chief Iustice of the Kings Bench.
Windham, Iudge of the Common Pleas.
Walmesley, Serjeant at *Law*, after Iudge of the Common Pleas.

Y.

Yelverton, Serjeant at *Law*, after Iudge of the Kings Bench.

The Names of the Cases.

Note { 1. P. ſtands for Principall Caſe
2. B ſtand for a Vouched Caſe.

A. Sect.

Allington and Bails Caſe. 34 P.
Albany and Biſhop of Saint Aſſaphs Caſe, 39 p
Aſhpool, and Inhabitants of Everinghams Caſe 72 p
Arden and Gents Caſe 75 b
Arundel and Morris Caſe 98 p
Allen and Palmers Caſe 133 p
Atkinſon and Rolfs Caſe 141 p
Atkins and Hales Caſe 192 p
Askew and Earl of Lincolns Caſe 196 p
Aſhegell and Dennis Caſe 272 p
Arundell, and Biſtop of Glouceſters Caſe 278 p
Alexander and Greſhams Caſe 306 p
Askew and Fuliambs Caſe 310 p
Auſtin and Smiths Caſe 441 p
Lord Abergavennies Caſe 469 p
Anonnimus, 2 p 8 p 15 p 17 p 38 p 40 p 45 p 61 p 73 b 75 p 81 p 83 p 86 p 94 p 104 p 108 p 109 p 116 p 132 p 145 p 150 b 157 b 173 b 220 p 221 p 222 p 224 b 226 p 266 p 285 p 290 p 296 p 308 p 335 p 349 250 351 352 353 354 355 356 357 358 359 360 361 365 371 386 390 392 393 396 397 400 401 408 418 443 444 451.

B.

Bornford and Packingtons Caſe 1 p
Benicomb and Parkers Caſe 31 p
Bedows Caſe 32 p
Braybrooks Caſe 51 p
Bullers Caſe 64 p
Biſhop of York and Mortons Caſe 69 p
Bunny and Wright, and Staffords Caſe, 77 p
Boneſant and Sir Richard Greenfields Caſe 78 p
Beverleys and Cornwallis Caſe 84 p
Bracebridge & Baskarviles Caſe 87 p
Barker and Pigots Caſe 89 p
Blaxnchflower and Friars Caſe, 91 p
Baſſet and Kerns Caſe 92 p
Bret and Auders Caſe 95 p
Brook and Kings Caſe 99 p
Baldwin and Cocks Caſe, 101 p
Bret and Shepherds Caſe 114 p
Baxter amd Bales Caſe 115 p
Butler and Ayres Caſe 118 p
Buſhies Caſe 122 b
Birds Caſe 125 b
Branchers Caſe 139 p
Bear and Underwoods Caſe, 142 p
Beverley and Bawds Caſe 148 p
Beares Caſe 154 b
Bronker and Robothams Caſe 162 b
Brook and Doughties Caſe 173 p
Bilford and Foxes caſe 189 p
Burgeſſes of Southamptons caſe 199 b
Lord Buckhurſt, and Biſhop of Wincheſters Caſe 213 p
Brockeſley and Wickams caſe 232 p
Bowry and Popes caſe 234 p
Bedel and Moors caſe 238 p
Bulleyn and Grants caſe 244 p
Boyton and Andrews caſe 259 p
Bunbury and Birds caſe 265 b
Bradſtocks caſe 288 p
Bagſhaw, and Earl of Shrewſburies caſe 292 p
Biſhop and Harecourts caſe 295 p
Byne and Playns caſe 303 p
Blaygrave and Woods caſe 309 p
Bownſell and Tylers caſe 314 p
Beal and Tailors caſe 320 p
Blunt and VVhitacres caſe 327 p
Biſhop of Lincolns and Cowpers Caſe 336 p
Bennet and Frenches caſe 339 b
Bracebridges caſe 355 p
Biſhop and Redmans caſe 375 p
Baskervile and Biſhop of Herefords caſe 379 p
Beddingfield, and Bedingfeilds caſe 385 p
Burgeſſe and Foſters caſe 395 p
Barret and Kings caſe 412 b
Bighton and Sawls caſe 428 b
Bond and Richardſons caſe 432 p
Beares caſe 440 p
Beal and Carters caſe 462 p
Bond and Bails caſe 464 p

Burchets

Burchets case 466 b
Birchleys case 469 b

C.

Caters case 12 p
Cham and Dovers case 19 p
Cordell and Gibbons case 22 p
Carters case 55 p
Case of the Mannor of Wadhurst 70 b
Coo e and Sorgats case 137 p
Sir Julius Cæsars case 144 p
Cibelt and Hills case 149 p
Charnock and Worsleys case 157 p
Cater and Booths case 170 p
Colborn and Mixtones case 176 p
Chamberlain and Thorps case 178 p
Chamberlain and Stantons case 193 p
Carie and Dennis case 201 p
Chapman and Hursts case 208 p
Lord Conniers case 228 b
Crec mere and Patersons case 242 p
Churchwardens of Fetherstons case 248 p
Cheney and Langleys case 252 p
Cockshall and the Mayor of Barltons case 269 p
Collman and Sir Hugh Portmans case 273 p
Cranmers case 279 b
Castle and Ouldmans case 282 p
Cottons case 297 p
Cheney and Smiths case 298 p
Lord Cobham and Browns case 299 p
Chamberlains case 302 p
Cook and Huets case 317 b
Cleypools case 369 p
Carriton and Godburies case 372 p
Carits case 380 p
Cole and Friendships case 391 p
Crisp and Goldings case 405 p
Collet and Andrews case 417 b
Carter and Cleycocks case 427 p
Corbets case 434 p
Crossman and Reads case 448 p
Cole and Walls case 463 p
Conny and Barhams case 444 p
Crew and Bayles case 465 p
Lord Cromwell and All Souls case 467 b
Corbet and Cleers case 467 b

D.

Duke of Northumberlands case 27 p
Dayrell and Thynns case 28 p
Sir Walston Dixies case 125 p
Docton and Priests case 136 p
Dellabay and Hassalls case 167 p
Dorrington and Dorringtons case 179 b
Lord Dudley and Lacies case 195 p
Sir Ed. Dyers case 203 b
Degory and Roes case 211 p
Dean and Cannons of Windsors case 228 b
Dove and Williots case 243 p
Dethicks case 337 p
Danvers case 180 b
Lord Darcie and Sharps case 381 p
Lord Dacres case 394 p
Darsley and Nevills case 414 p
Dennis and Saint Johns case 453 p
Dormers case 132 p

E.

Estops case 33 b
Earl of Warwick & Lord Barckleys case 68 p
Earl of Arundel & L. Dacres case 117 p
English and Pellitories 169 p
Earl of Lincolns case 238 b
Edwards and Tedburies case 268 p
Erbery and Lattons case 270 p
Estons case 341 p
Englishes case 157 b
Earl of Leicester & Tanfields case 377 b
Elmes and Medcalfs case 426 p
Eveſq. of Coventry and Licchfields case 427 b

F.

Forman and Bohans case 18 p
Floud and Sir John Perrots case 35 p
Fullwood and Fullwoods case 74 p
Fordleys case 88 p
Ferrors case 146 p
Foster and Thorns case 173 b
Sir George Farmer and Brocks case 199 p
Fox and Collins case 205 b
Fisher and Boys case 228 b
Fish and Browns case 253 p
Fenwick and Mitfords case 256 p
Foster and Pifalls case 347 p
Ferrand and Ramseis case 362 p
Flemings case 403 p
Fabian and Windsors case 425 p
Frend and Batts case 450 p
Foster and Wilsons case 458 p

G.

Gilbert and Sir George Harts case 5 p
Gray and Jets case 63 p
Gamock and Cliffes case 78 p
...ill and Harewoods case 80 p
Gellibrand and Harts case 83 b
Gunerston and Hutchers case 103 p
Gerings case 107 p
Glosse and Haymans case 110 p
Sir Thomas Greshams case 113 p
Gates and Holliwels case 130 p
Lord Greys case 156 b
Gage and Paxtins case 158 p

Gate-

Gatefould and Penns case 174 p
Gomerſall and Biſhops caſe 175 p
Sir Henry Goodiers caſe 185 p
Geſlin and VVarburtons caſe 187 p
Gibbs caſe 225 p
The Guild of Boſtons caſe 228 b
Galliard and Archers caſe 267 p
GreenWood and VVeldens caſe 294 p
Green and Edwards caſe 300 p
Gawton and Lord Dacres caſe 301 p
Gore and Dawbneys caſe 316 b
Greenliff and Bakers caſe 317 p
Green and Pendletons caſe 318 b
Guilfords caſe 322 p
Gallery and Bunburies caſe 328 b
Geofries and Coites caſe 329 b
Greens caſe 348 p
Gibbs and Rowleyes caſe 367 p
Gerrard and Sherringtons caſe 398 p
Gravenor and Maſſeys caſe 398 p
Glanvill and Mallaries caſe 421 p
Gillam and Lovelaces caſe 435 p
Greeves caſe 436 p
Green and Hundred of Bucklechurches caſe 456 p

H.

Haddons caſe 10 b
Harvy and Hervyes caſe 26 p
Hungerfords caſe 36 p
Higham and HareWoods caſe 42 p
Henly and Broads caſe 53 p
Hudſon and Leighs caſe 65 p
Heydons caſe 96 p
Hawkes and Mollineux caſe 100 p
Hamington and Rydears caſe 120 p
Howell and Trivanians caſe 121 p
Hudſons caſe 121 b
Higham and Reynolds caſe 123 p
Haithſome and Harvies caſe 166 p
Hoskins and Jones caſe 177 b
Hunt and Gilborns caſe 182 p
Hedd and Challoners caſe 204 p
Heayes and Allens caſe 210 p
Hawkings and LaWſes caſe 214 p
Huſon and Webbs caſe 229 p
Hambleden and Hambledens caſe 230 p
Hauxwood and Husbands caſe 249 p
Howe and Connys caſe 254 p
Holland and Franklyns caſe 257 p
Hill and Hills caſe 321 p
Hill and Lockhams caſe 331 b
Harvy and Thomas caſe 332 p
Hartopps caſe 342 p
Henningham & Windhams caſe 346 p
Hales caſe 374 b
Huddy and Fiſhers caſe 377 p
Hollingſhed and Kings caſe 384 p
Harris and Bakers caſe 417 p
Hare and Okeleys caſe 439 p
Hudſon and Leighs caſe 447 p
Hoskins and Stapers caſe 468 p

I.

Sir Henry Iſleys caſe 102 b
Jerome and Neales caſe 143 p
Jerome and Knights caſe 146 p
Jennings and Winches caſe 214 p
Ivory and Fryers caſe 216 p
Iſleys caſe 264 p *James caſe* 264 b
Jones caſe 281 p
Jennings and Gowers caſe 311 p
Jeofry and Coites caſe 329 p
Johnſon and Bellamies caſe 330 b
Jennor and Hardeys caſe 383 p

K.

Keeme and Hollingborns caſe 25 p
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L.

Lendell and Pinfolds caſe 24 p
Lodge and Luddingtons caſe 26 b
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Liveſeys caſe 106 p
Littletons and Perns caſe 186 p
Lee and Maddox caſe 235 p
L. Lumley and Fords caſe 263 b
Long and Hemmings caſe 289 p
Lancaſters caſe 291 p
Linacres caſe 313 p
Lancaſter and Lucas caſe 316 p
Lacies caſe 363 p
Lodges caſe 376 p
Lees caſe 387 p
Lee and Curetons caſe 412 p
Lacy and Fiſhers caſe 413 p
Loves caſe 421 b
Lemons caſe 427 b
Leigh and Okeleys caſe 438 p

M.

Moore and Farrands case 6 p
Manies case 7 p
Marques of VVinchesters case 18 b
Marsh and Smiths case 33 p
Mollineax case 39 b
Marques of Northamptons case 44 b
Mascals case 82 p
Moile and Earl of VVarwicks case 85 p
Martin and Stedds case 111 p
Mounson and VVests case 112 p
Mitchell and Hides case 119 p
Lord Mountioyes case 157 b
Musket and Coles case 168 p
Mebb and Friends case 178 b
Mounson and VVests case 181 p
Lady Mallories case 189 b
Mallet and Ferrers case 191 p
Marsh and Astreys case 203 p
Marriot and Pascalls case 228 p
Musted and Hoppers case 241 p
Matthew and Hassals case 245 p
Mills and Snowbals case 287 p
Matheson and Trotts case 293 p
Martingale and Andrews case 319 p
L. Mortdant and Vaux case 330 b
Mordants case 207 b
Manning and Andrews case 345 p
Maunser and Annesleys case 374 b
Mayor of Lynns case 404 p
Maidwell and Andrews case 429 p
Marshes case 433 p
Mitchell and Hares case 452 p
Marshes case 459 p
Marbery and VVorrels case 466 b

N.

Lord Norris and Braybrooks case 28 b
Nash and Edwards case 155 p
Nash and Mollins case 325 p
Norwood and Dennis case 455 p

O.

Oldfeild and VVilmers case 194 p
Osbon and Kirtons case 258 b
Offley and Sattingstons case 321 p
Ognell and Underwoods case 339 b
Ognell and Sheriffs of London 374 p
Oglethorp and Hydes case 430 p

P.

Lord Paget and Sir VValter Ashtons case 4 p
Lord Paget and the Bishop of Coventries case 9 p
Punsany and Leaders case 14 p
Parmort and Griffins case 47 p
Partridge and Patridges case 48 p
Pendleton and Gunstons case 60 p
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Parson of Facknams case 67 p
Prowse and Caries case 131 p
Pearl and Edwards case 134 p
Pawlet and Lawrences case 138 p
Peirce and Leversuches case 163 p
Page and Jordans case 165 p
Piers and Hoes case 171 p
Pierce and Howes case 179 p
Pelmer and Smalebrooks case 180 p
Povest of Queens Colledge case 183 p
Park and Mosses case 200 p
Pexhals case 156 b
Palmer and Thorps case 239 p
Palmer and Knowles case 247 p
Petty and Trivilians case 276 p
Pagets case 284 p
Palmes and Bishop of Peterboroughs case 312 p
Pet and Basdens case 318 p
Page and Fawcets case 328 p
Pendleton and Haw's case 175 b
Pawley and Siers case 370 p
Penruddock and Newmans case 378 p
Perry and Alleins case 420 p
Pett and Callys case 422 p
Piggot and Harringtons case 445 p

Q.

Queen and Lord Vaux case 49 p
Queen and the Bishop of Londons case 50 p
Queen and Middletons case 58 p
Queen and Lewes and Greens case 162 p
Queen and Bishop of Canterburies case 190 p
Queen and Buckberds case 207 p
Queen and the Bishop of Canterburie, and Fanes case 280 p
Queen and the Bishop of Yorks case 307 p
Queen and Braybrooks case 364 p
Queen and the Dean of Christchurch case 399 p

R.

Rearesby and Rearesbies case 16 p
Richards and Bertletts case 23 p
Rumney and Eves case 128 p
Rivet and Rivetts case 159 p
Read and Nashes case 205 p
Read and Johnsons case 217
Rockwood and Rockwoods case 275 p
Rigden and Palmers case 277 p
Russell and Pratts case 278 p
Randall and Browns case 339 b

Ruſſell and Handfords caſe 368 p
Rotcheſters caſe 380 b
Rolſton and Chambers caſe 382 p
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Rawlins caſe 416 p
Rider and Cobhams Caſe 447

S.

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Severen and Clarks caſe 164 p
Leonard Sturtons caſe 171 b
Stranſham and Medcalfes caſe 177 p
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U.

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Wignall and Brookes caſe 177 b
Wooden and Hazells caſe 184 p
Ward and Blunts caſe 197 p
Wright and the Biſhop of Norwiches caſe 218 p

Whisker and Cleytons case 219 p
Ward and Blunts case 251 p
Weston and Grendons case 255 b
Woodshaw and Fulmerstons case 262 p
Windham and Sir Edward Cleeres case 263 p
Wickes and Dennis case 271 p
Walgrave and Ogdens case 305 p
Ward and Knights case 315 p
Wiseman and Warringers case 339 b
Weston and Garmons case 343 p
Willis and Crosbies case 373 p
Williams and Blowers case 402 p
Walpoole and Kings case 407 p
Wiggot and Clarks case 419 p
Wangford and Sectons case 423 p
Wilmer and Oldfeilds case 424 p
Wolman and Fies case 449 p
Willis and Whitewoods case 454 p
Wade and Presthalls case 466 p
Wharton and Morleys case 467 b
Walgrave and Agars case 469 p

Z,

Zouch and Bamfeilds case 102 p

REPORTS

REPORTS and CASES OF LAW,

Argued and adjudged in the time of Queen *Elizabeth*, from the twenty fourth to the three and thirtieth year of her Reign.

Hill. 25. *Eliz.* in the Kings Bench.

I. Borneford *and* Packingtons *Case.*

IN Treſpaſſe, It was found by ſpecial verdict, That the Defendant was ſeiſed of the Mannor of B, whereof the place where is parcel, demiſed and demiſeable by Copy, &c. And that B the Grandfather of the Plaintiff was ſeiſed of the place when, &c. according to the cuſtom of the ſaid Mannor, in Fee-ſimple, and that within the ſaid Mannor there is this Cuſtom, That if any Copy-holder dyeth ſeiſed, his Wife over-living him ſhall hold all the Land during her Widowhood as Free-bench, and ſhall be admitted Tenant to the Lord, and that the Heir ſhall not be admitted to it during the life of his Mother: And found alſo another Cuſtom within the ſaid Mannor, That if any Copy-holder be convicted of Felony, & the ſame be preſented by the Homage, that then the Lord might ſeize, &c. And it was further found, that the Grandfather of the Plaintiff took a Wife, and dyed ſeiſed, having iſſue A, Father of the Plaintiff. The Wife is admitted to her Free-bench, A is convicted of Felony, and that is preſented by the Homage; and afterwards A dyed, after which the Wife dyed, &c. It was argued by Atkinſon, that this A is not within the danger of this Cuſtom, for during the life of his Mother, who by the Cuſtom is Tenant to the Lord, and admitted to it, ſhe is Copy-holder; and it is not like to the Caſe lately adjudged of poſſeſſio fratris, without admittance, for there the party was admittable, and ſo he was not here: And alſo it appeareth by the Cuſtom as it is found, That the Lord upon ſuch matter ſhall ſeize, and therefore we ought to make conſtruction that this Cuſtome do not extend to Caſes where the Lord cannot ſeize; but in the Caſe at Barre, the Lord cannot ſeize by reaſon of this Free-bench; And we ought not by any conſtruction extend a Cuſtom beyond the words in which it is conceived, but it ſhall be taken ſtrictly, and not be ſupplyed by Equity with a Cuſtom in the place of a Seiſure. But notwithſtanding all this, afterwards Judgment was given againſt the Plaintiff. Cuſtom of Free-Bench.

II. *Hill.* 25. *Eliz.* in the Kings Bench.

A Copy-holder doth surrender to the use of one A upon trust, that he shall hold the said Land until he hath levyed certain monies, and that afterwards he shall surrender to the use of B; the moneys are levyed, A is required to make surrender to the use of B, he refuseth, B exhibits a Bill to the Lord of the Mannor against the said A, who upon hearing of the Cause decrees against A, that he shall surrender; he refuseth, now the Lord may seize, and admit B to the Copy-hold, for he in such Cases is Chancellor in his own Court, per totam Curiam.

Hill. 25. *Eliz.* in the Kings Bench.

III. Wade *and* Bemboes *Case.*

IN a Writ of Error by Wade against Bembo upon a Judgment given in the Court of the City of Bristol, the Case was, That Bembo was Plaintiff in the said Court against Wade in an Action of Covenant, and declared of a Covenant made by word by the Testator of Wade with Bembo; and declared also, that within the said City there is a Custom, That Conventio ore tenus facta, shall bind the Covenantor as strongly as if it were made by writing: And it was holden by the Court, that that Custom doth not warrant this Action, for the Covenant binds by the Custom the Covenantor, but doth not extend to his Executors, and a Custom shall be taken strictly, and therefore the Judgment was reversed.

25 *Pasch.* 25. *Eliz.* in the Kings Bench,

IV. *The Lord* Paget *and Sir* Walter Ashtons *Case.*

THe Lord Paget brought an Action of Trespasse against Sir Walter Ashton, who justified because he is seised of three Messuages to him and his Heirs, and that he and all those whose estate he hath, &c. have had the Wardenship of the Forrest of C, within which, the place where, &c. and also have had within the said Forrest Estovers without number: And that one Rowland Bishop of Coventry and Leichfield was seised of the Forrest aforesaid in the right of his Church, and by Indenture betwixt him and Sir Edw. Ashton his Ancestor, whose Heir he is, setting forth that divers debates had been betwixt the said parties concerning some profits within the said Forrest; It was agreed betwixt them, that the said Sir Ed. Ashton should release unto the said Rowland all his right in the said Office and Estovers, and that the said Rowland should grant de novo unto the said Edw, and his Heires the said Office, and one hundred loads of Estovers per annum out of the said Forrest: After which the said Ed. according to the said agreement, did release to the said Bishop, ut supra, after which the said Bishop by Indenture reciting the said former Covenants in compl. Indenturæ predict Convent. did grant to the said Sir Ed. the said Office and Estovers pro ea tamento dicti Edwardi, & hæred. suorum by assignment of the Officers of the said Forrest; & if the assignment be not made within ten days after request, that then the said Ed. and his Heirs should cut down wood where they pleased; and averred, the things released were of as great value as the things granted: And upon this matter the Plaintiff did demurre in Law, and it was adjuded for the Plaintiff, for here no Inheritance in the things granted passed to the said Sir Edward, but only an Interest for his own life; for the grant was to Sir Ed. only without the word, Heirs; and the reference to the Indentures, by which the Bishop hath covenanted to grant the Inheritance, nor the words in the grant imply an estate in Fee, s. pro easimento dict. Ed. & hæred. suorum, and that in default

default of Assignment it should be lawful for Sir Ed. and his Heirs, shall not supply the defect of the words in the grant.

Mich. 25. and 26. *Eliz.* in the Kings Bench.

2. Gilbert *and Sir* George Harts *Case.*

Gilbert brought Debt upon Escape against Sir George Hart Sheriff of Kent and declared, That he recovered a certain debt against A, who was taken in Execution, &c. And the Case was, That the said A was taken in Execution in the time of the old Sheriff, and escaped also then: and afterwards the Defendant being Sheriff, the Plaintiff again sued a Scire facias against the said A upon the Judgment aforesaid, upon which Execution was awarded by default, and thereupon issued a Capias ad satisfaciendum, by which A was taken, and escaped: And by the opinion of all the Justices, the Defendant in this Case shall be charged; for notwithstanding that A was once in Execution, which was determined by escape in the time of the old Sheriff, yet when Execution was now awarded against him upon his default in the Scire facias, the same shall bind the Sheriff out of whose custody he escaped. Escape.

Mich. 25, and 26. *Eliz.* in the Common Pleas.

6. Moor *and* Farrands *Case.*

Moore leased Lands to Farrand upon condition that he, his Executors or Assignes should not alien without the leave of the lessor; Farrand died intestate, his Wife took Letters of Administration, and aliened without leave, and by Periam Justice, she is not within the penalty of the Condition, for the Administrator is not meerly in by the party, but by the Ordinary: And by Meade and Periam, If a Lease for years upon such a Condition be extended upon a Recognisance, the same is not an allienation against the Condition: But feme lessee for yeares upon such Condition taketh a Husband and dyeth, the Husband is within the danger of the Condition, for he is Assignee: If the King grant to a Subject bona & cattalla felonam, and the lessor for yeares upon such a Condition be outlawed, upon which the Patentee enters, Now by Periam the Patentee is not bound by the Condition, Meade contrary, for the Condition shall go with the Land. Condition where shall not bind Administrators.

Mich. 25, and 26. *Eliz.* in the Exchequer.

7. Maynyes *Case.*

Mayney seised of Lands in Fee, took a Wife, made a Feoffment to a stranger, committeth Treason, and thereof is attainted, and hath a Charter of Pardon and dyeth. It was moved by Plowden in the Exchequer, if the Wife of Mayney shall have Dower against the Feoffee: Manwood Cheif Baron, by reason of this Attainder Dower cannot accrue to the Wife, for her title begins by the Enter-marriage, and ought to continue and be consummated by the death of the Husband, which cannot be in this Case; for the Attainder of the Husband hath interrupted it, as in the Case of Elopement: And this Attainder is an universal Estoppel, and doth not run in privity only betwixt the Wife and him to whom the Escheat belongs, but every stranger may barre her of her Dower by reason thereof; for by the Attainder of the Husband the Wife is disabled to demand Dower as well as to demand his Inheritance; and he cited the Resolution of all the Justices of England in the Case of the Lady Gates, 4. Ma. Dyer, 140. and the Pardon doth not help the matter, for the same extends but to the Dower. Attainder where an Estoppel.

life of the Offender, but doth not take away the Attainder, by which she is barred to demand Dower during the said Attainder in force: See the Statute of 5. E 6 cap. 11. Vid. Fitz. Dower 82. 13. E 3. 8. E 3. Dower 106. Fitz. Ut leg. 49.

8 *Mich.* 25, and 26. *Eliz.* in the Exchequer.

Leases for three lives of Copy hold estate are not within Stat. 31. Eliz.

IN the Exchequer it was found by special verdict, That the Guardians and Channons Regular of Otlery were seised of the Manor of O, &c. and that 22. H 7. at a Court holden there, granted the Lands in question to W and W his Son for their lives by Copy, according to the Custom of the said Manor, and that afterwards 30 H 8 They leased the said Lands by Indenture to H, rendering the ancient and accustomed Rent, and afterwards surrendered their Colledge, &c. and afterwards W and W died: And if that Lease so made during the customary estate for life, notwithstanding the Statute of 31 H, be good or not, was the Question, being within a year before the Surrender, &c. It was argued by Egerton Sollicitor, that the said Lease is void by the Statute; the words of which are (whereof or in the which any estate or interest for term of life, year, or years, at the time of the making of any such Lease, had his being or continuance and was not then determined, finished, or expired) and therefore we are to see, if that right or possession which W had at the time of the making of the Lease, were an interest, or an estate for life: And as to this word (estate) it is nothing else then measure of time, for an estate in Fee-simple is as much as to say, an interest in the Lands for ever, and the like of other estates: and therefore here W and W had at the time of the making of this Lease an estate for life in the thing demised: And although such customary Tenants are termed in Law Tenants at will, yet they are not simply so, nor meerly Tenants at will, but only Tenants at will, secundum Consuetudinem Manerii, which Custome warrants his possession here for his life, and therefore it is a more certain estate then an estate at will, for the Copyholder may justifie against his Lord, so cannot a Tenant at will, whose estate is determined at the will and pleasure of his Lessor: And although this estate is but by Custom, and by no Conveyance the estate is raised; it is as material, so as it be an estate: and this estate being supported by Custom is known in Law an estate and so accounted in Law; and the Law hath notably distinguished Copy-hold, Tenancies by Custom, and Tenancies at will by the Common Law; for a Copy-holder shall do Fealty, shall have aid of his Lord in an Action of Trespasse, shall have and maintain an Action of Trespasse against his Lord, his Wife shall be indowed, the Husband shall be Tenant by the Curtesie without new admittance: and it was adjudged in the Common Pleas, 8. Eliz. That if a Copy-holder surrender to the use of another for years, the Lessee dyeth, his Executors shall have the residue of the Term without any admittance: M 14. and 15. Eliz. a Copy-holder made a Lease for yeares by Indenture warranted by the Custom, it was adjudged that the Lessee should maintain Ejectione firm. although it was objected, that if it were so, then if the Plaintiff doth recover, he should have Habere facias possessionem; and then Copy-holds should be ordered by the Laws of the Land, 10. Eliz. Lord and Copy-holder for life, the Lord grants a Rent-charge out of the Manor, whereof the Copy-holder is parcel, the Copy-holder surrenders to the use of A, who is admitted accordingly, he shall not hold it charged, but if the Copy-holder dyeth, so that his estate is determined, and the Lord granteth to a stranger de novo to hold the said Lands by Copy, this new Tennant shall hold the Land charged: and so was it rated and adjudged in the Common Pleas. It was adjorned.

Copy-holders Interest.

Mich

Mich. 25. & 26 *Eliz.* in the Kings Bench.

9. The Lord *Paget*, and the Bishop of *Coventry* and *Leichfeilds* Case.

THE Bishop of Coventry and Leichfeild was endicted of Trespasse in the County of Stafford, of breaking and entring of the Close of Thomas Lord Paget, called the Vineyard, the Bishop traversed the Endictment, and at the day of appearance of the Jury, the Bishop challenged the Array, because that he being a Peer of Parliament, no Knight was returned, &c. Upon which challenge the Queens Counsel did demur in Law, but at last, for expedition, &c. the Court delivered to the Counsell of the Bishop, a Bill sealed to save him the advantage of the said challenge: And the request was taken, de bene esse, who found, that one A by the Commandant of the Bishop entred into the said Close called the Vine-yard, being then in the occupation of one B at will, of the said Lord Paget, and did the Trespasse: viz. digged a Turff there, and there left it, and so departed. The matter of challenge was many times argued, and it was argued against the said challenge, because that the King is party, against whom no Lord of Parliament shall have such Prerogative, to which it was answerd on the other side, that so much the rather, the challenge lyeth in the Case, for where a Peer of the Parliament is to be tryed upon an Endictment of Treason or Felony, it shall be per pares, if upon appeal of Murder, or Felony by ordinary tryall, See 33. H. 8. Br. Tryall 42. and Br. Enquest, 49. It was said on the other side, that here the Bishop is quodam modo, and the Venire facias issued at his own Sute, and therefore the mismaking of the Pannell is his own fault; But by Gawdy Justice, the Venire facias in this Case is reputed in Law, the Sute of the Queen, notwithstanding that the party endicted for his expedition, doth pay the Fees for the Processe, for that, the Clarks of the Court have encroached for their gaine, for otherwise there should be none paid by the Queen, and by the better opinion of the Court, the challenge was holden good: Another matter was moved, because the Endictment is (clausum Domini Paget) and it appeareth by the Verdict, that the said close at the time of the Trespasse was in the occupation of B, at the will of the Lord Paget: for the Lord Paget cannot have an Action of Trespasse against the said Bishop, or the said A upon the matter, & by Wray, the Lord Paget cannot have Trespass, Quare clausum fregit & intravit upon this matter, but for digging upon the Land, demised, or cutting of Trees, an Action lyeth, 19. H. 6. to Trespasse, 36. But here the Endictment is, that one F entred by the commandment of the Bishop, upon which matter no Action lyeth against the Bishop, by the Lord Paget, and especially in this case where the said A did not carry away the said Turff from thence, but by Wray, notwithstanding that the Action of Trespasse doth not lye for the Lessor, yet it is well enough by way of Endictment: Another exception was taken to the Endictment, because it is alleadged, that A by commandment of the Bishop entred, and did the Trespasse, and no place is shewed where the commandment was, and for this cause, the Bishop was discharged.

Endictment. Challenge.

Mich. twenty five, and twenty six *Eliz.* in the Kings Bench.

10. *Stoneley*, and *Bracebridges* Case.

IN Ejectione firmæ, by Stoneley against Bracebridge, the case was, Thomas Bracebridge Father of the Defendant was seised of the Manor of Kingsbury, to him and to the heires males of his body, and 32. H. 8. Leased a Feild called Stalling, parcell of the said Manor, to Tho. Coke for years, and afterwards, 4. E. 6. Leased the said Feild (the first Lease being in esse) to Sir Geo. Griffith for seventy

Mich

seventy years, who assigned the same to A Bracebridge Brother of the Lessor, and to Joyce Wife of the Lessor, and afterwards, 5. E 6. The said Tho. Bracebridge, the Lessor, by his Deed Indented, gave the said Mannor to the said Sir George by these words (dedi concessi, barganizavi, & vendidi) Proviso, and upon condition, That the said Sir George, should pay to the said Thomas Bracebridge, within fifteen dayes after, ten hundred pounds, and if he faile of payment thereof, that then after the said fifteen dayes, the said Sir George should be seised of a Tenement, parcell of the said Mannor of the yearly value of three pounds (now of late in the occupation of Thomas Smith) to the use of the said Thomas Bracebridge for his life, and after to the said Sir George, untill he had levyed five hundred pounds for the payment of the debts, and the education of the children of the said Thomas Bracebridge, and after to the use of the Defendant in tail: And of the residue of the said Mannor, to the use of the said Tho. Bracebridge, and of the said Joyce his Wife for their lives, &c. Tho. Bracebridge, made livery to the said Sir George, in one place parcell of the said Mannor, which was in his own occupation in the name of the whole Mannor: the fifteen dayes incur without payment of the said ten hundred pounds, the Indenture is enrolled: Coke attorney, Joyce dyes, Tho. Bracebridge grants the Lands to a stranger by Office, and before Proclamations. Thomas his Son and Heire apparent, within age, enters, in the name of the Feoffees by reason of the forfeiture, Proclamations are made, Tho. Bracebridge the Father dyeth, the Terme of Coke expireth, A enters, and leaseth to the Plaintiff who enters, upon whom Tho. Bracebridge the Son enters, upon which Entry the Action is brought, it was forgered by Beamount the elder: Although here in the Indenture of bargain & sale, there is not an expresse consideration set down in the common forme of a consideration, yet because the consideration is implyed in the condition it is good enough (see the Proviso and condition, ut supra, that the said Sir George should pay, &c.) As if I bargaine and sell to you my Land, Proviso that you pay to me for the same at such a day one hundred pounds, that consideration set downe in the forme of a condition is as effectuall, as if it had been formally expressed in the usuall Termes, as to the second payment: Where a man bargaines and sells his Lands by Deed indented to be enrolled, and before enrollment he makes Livery to the Bargainee, and afterwards the Indenture is enrolled, the Court discharged Beamount from the arguing of that payment, for by Wray, the Livery doth prevent the operation of the Enrolment, and Sir George shall be accounted in by the Livery, and not by the bargaine and sale; for Livery is the more worth, and more worthy ceremony to passe estates, and therefore shall be preferred: and then the Livery being made in such part of the Mannor, which was in the possession of the Feoffor in the name of the whole Mannor, no more of the Mannor passeth but that which was then in the possession of the Feoffor: And the Reversion of such part of the Mannor which was in Lease shall not passe without Attornement, but when the Enrolment cometh, now the whole passeth, and then the Reversion being setled by the Enrolment, the Attornement coming afterwards hath no relation: See 48. E. 3. 15, 16. The Jury here have found the default of payment, thereby the conditionall use which passed by the bargaine and sale, upon the condition broken, shall be reduced to the Bargainor without any Entry, & then the uses limited after are void, for in use limited upon an use cannot rise; quod fuit concessum per totam curiam, then Bracebridge the Father, having the Inheritance of the said Mannor in his own right, and the interest de futuro, for yeares in the right of his Wife joyntly with the said A, when he sells the said Mannor by Deed indented and enrolled, now thereby the interest for yeares which he hath in the Right of his Wife doth not passe, for a bargaine and sale is not so strong a conveyance as a Livery. As if I have a Rent-charge in the right of my Wife, out of the Mannor of D, which Mannor afterwards I purchase, and afterwards by Deed indented and enrolled, I bargaine and sell the said Mannor, &c. the Rent shall not passe.

Livery, where it prevents operation of an Enrolment.

passe. Then the said Thomas Bracebridge the Father having the said Right of an entaile to him and the Heires Males of his body, and being Tenant for life, by his own conveyance, the Remainder in tail to his Son and Heire apparant, the new Defendant, when he levyeth a Fine, and the Son enters for forfeiture before Proclamations passe, and his Father dyeth, in that case the Defendant is not remitted unto the first entail, although after Proclamations passe in the life of the Father, and so he shall not avoid the Leases; for notwithstanding that the Issue in tayle by that Entry hath defeated the possession which passed by the Fine, yet as to the right of the old entail, the Fine doth retaine its force, and so he entred, quodam modo, in assurance of the Fine: As if Tenant in tail doth discontinue and dissei'eth the Discontinuee, and levyeth a Fine with Proclamations, and the Discontinuee enters within the five yeares, now although the Fine as to the Discontinuee be avoided, so as the possession which passed by the Fine is defeated, yet the right of the entail doth continue bound: Egerton Solicitor contrary: and he conceived, that all the Mannor doth passe by the Livery to Sir George, and nothing of it by the Enrolment, and that the meaning of the parties was, that all should passe by the Livery, for if the assurance should enure by the bargaine & sale, then the secondary uses limited upon default of payment, should never rise; for an use upon an use cannot rise, & then the said uses limited for the payment of the debts of the Feoffor, &c. should be defeated, & also where at the begining of the assurance, the condition was entire, the warranty entire, &c. & if such construction should be allowed, here shall be a divided condition, a divided warranty: And also the meaning of the parties that the whole Mannor should passe, by such construction should be dismembred, and part passe by the Livery, and part by the bargaine and sale, and we ought to make such constructions of Deeds, that things may passe by them according to the meanings of the parties; as if I be seised of a Mannor to which an Advowson is appendent, and I make a Deed of Feoffment of the same Mannor, cum pertinencijs, and deliver the Deed to the party, but no Livery of seisin is had, the Advowson shall not passe, for then it should be in grosse, whereas the meaning of the parties was, that it should passe as appendant, and that in such case cannot be, for there is no Livery, therefore it shall not passe at all, and so it hath been adjudged: So if I bargaine and sell my Mannor of D, and all the Trees in the same, and I deliver the Deed, but it is not enrolled, the Trees shall not passe, for the intent of the parties was, that the Trees should passe, as parcell of the Free-hold and not as Chattels. And as to the remitter, I conceive, that the Heire entring as Heire, by the Law is remitted, but where the Entry is given by a speciall Statute, there the Entry shall not enure further then the words of the Statute; As Land is given to the Husband and Wife, and to the Heires of the body of the Husband, the Husband levyeth a Fine and dyeth, the wife entreth, this Entry shall not availe to the issue in tail, for the Entry is given to the Wife by a speciall Law: And he cited Sir Richard Haddons Case, the Husband alienes the Lands of his Wife, they are divorced, the Husband dyeth, the Wife shall not enter by 32. H. 8. but is put to her Writ of Cui invita ante divor. And afterwards the same Terme the Justices having considered of the Case, delivered their opinions upon the matters by Wray cheif Justice, viz. That the one moyety of the Lease was extinct by the Livery, viz. the moyety of Ioyce the Wife of the Lessor; and as to the other moyety it is in being, for here is no remitter; for if any remitter had been in the Case, it should be after the use raised, which is not as yet raised, for the Land ought to remaine in Sir George untill the said five hundred pounds be levyed, and that is not found by the Verdict, and therefore for the said moyety, the Plaintiff had Judgement.

Mich.

Mich. 25, and 26. *Eliz.* in the Exchequer.

XI. Treſhams *Caſe.*

SIR John Treſham ſeiſed of the Mannor of Dholden of the King in Capite by Knights ſervice, 4. H 7. enfeoffed Edmund Earl of Wilts and N Vaux Knight, who gave the ſaid Mannor to the ſaid Sir John in tayle, upon condition that he ſhould not alien, &c. quo minus, &c. John Treſham dyed ſeiſed, by whoſe deceaſe the Mannor deſcended to Tho Treſham, who entred, and 18. H 8. alienes with licence, by recovery, &c. N. Vaux the ſurviving Feoffee dyed, having iſſue W Lord Vaux; the purchaſor dyed ſeiſed, his Son and Heir 14. Eliz. levyed a Fine Sur Conuſans de droit, &c. and that Fine was levyed to the uſe of the Conuſee, &c. and that without licence: The Lord Vaux within five yeares after the Fine levied, entred for the condition broken: and now iſſued forth a Scire facias againſt the Conuſee for that alienation without licence, who made default, whereupon iſſued proceſſe to ſeize the Lands; whereupon came Sir Tho. Treſham, and ſhewed the whole matter aforeſaid, and prayed to be diſcharged.

Fine for Allienation without Licence.

It was ſaid, that this Prerogative to have a Fine for alienation without licence, had lately beginning upon the original Creation of Seignories, ſo as this prerogative is as it were paramount the Seignory, and ſhall go paramount the Condition, as well as the Condition is paramount the Alienation, but if the diſſeiſor of the Tenant of the King maketh a Feoffment in Fee, now upon the entry of the diſſeiſee, the perſon of the Feoffee ſhall be charged with a Fine, but the Land by the re-entry of the diſſeiſee is diſcharged: and ſuch is the opinion of the Lord Frowick, in his Reading upon the Statute of Prerogativa Regis, and the reaſon is, becauſe the diſſeiſor is not Tenant to the King, and ſo when he aliens, it cannot be ſaid an Alienation by the Kings Tenant. See 45. E. 3.6. If the Tenant of the King in chief leaſeth for life with licence, and afterwards grants the Reverſion over without licence, the Tenant for life is not bound to atturn in a Quid juris clamat; wherefore it ſeems, that if ſuch Tenant doth attorne, the King ſhall ſeize preſently.

Entry for Condition, what acts it ſhall defeat.

This Entry for the Condition broken is not to have ſo violent a retroſpect to the firſt livery to which the Condition was annexed, that it ſhall defeat all things meane between the Creation and the branch of the Condition, but it ſhall defeat all mean things which riſe upon the act of the party, as Rent, Dower, &c. But charges which accrue by reaſon of Tenure, do remain, notwithſtanding the Entry for the Condition broken: As if ſuch a Tenant of the King maketh a Feoffment in Fee upon condition which is broken, the Feoffee dieth ſeiſed, his Heir of ful age, the Feoffor re-entereth this re-entry by force of the condition broken, hath not ſo avoided the deſcent,

Condition ſhall not avoid an Intereſt veſted.

but the King ſhall have Relief upon the ſaid deſcent, for the Relief is paramount the Livery, and the condition. So if a Feoffee upon condition diſclaim in Avowry, by which the Lord brings a Writ of Right Sur Diſclaimer, and hath Judgment; the Feoffee entreth for the condition broken, the ſaid re-entry ſhall not avoid the intereſt of the Lord by the Judgment on the Writ of Diſclaimer, but he may enter at his pleaſure; and it was moved by Plowden who argued for Treſham, that if the Tenant of the King, being Non Compos mentis, makes a Feoffment in Fee, and dyeth, his Heir entring upon the Feoffee ſhall not pay a Fine for the Allienation of his Father, but the perſon of the Father ſhall be charged with it. And at the end of this Term, after many Arguments and Motions, Judgment was given for the Queen, that ſhe ſhould ſeize the Land and hold the ſame for the Fine, and that ſhe ſhould not be driven to ſue the perſon of the Feoffee or Conuſee: And by Manwood cheif Baron, at the Common Law in many Mannors, Tenant in ſoccage upon every alienation ſhall pay a Fine, nomine relevii a fortiori, in the Kings caſe, and therefore he was of opinion,

That

that this Prerogative to have a Fine for alienation without licence is by the common Law, and not by any Statue.

Mich. 25, and 26. *Eliz.* in the Exchequer Chamber.

XII. Caters *Caſe.*

A Bill of Intruſion was in the Exchequer againſt Cater; who pleaded the Grant of the Queen, the Plaintiff replicando ſaid, that before the Queen had any thing, &c. Sir Francis Englefield was ſeiſed of the Manor, of which, &c. and he being beyond the Seas, the Queen ſent her Letters under the Privy Seal, Quod ipſe in fide, & legeantiâ quâ dictæ Reginæ tenebatur, indirecte rediret in Angliam, predict. tamen Franciſcus (ſpretis mandatis dict. Reginæ) venire recuſavit, for which a Certificate was by the ſaid Queen into the Chancery, Quod dictus Franciſcus in portibus tranſmarinis ſine licentia dict. Reginæ remanſit: And thereupon a condition was awarded to ſeize the Lands of the ſaid Sir Francis, which was entred in the Replication in hæc verba, reciting alſo the Queens Privy Seal, and that the ſaid Sir Francis did ſtay there (ſpretis mandatis, &c.) for which the Queen ſeiſed and granted to the Plaintiff: And afterwards the Statutes of 13. and 14. Eliz. were made: after which the ſaid grant was made to the Defendant, upon which matter there was a Demurrer and Judgment given for the Plaintiff. And now Cater brought a Writ of Error in the Exchequer Chamber, and it was firſt aſſigned for Error, becauſe that the Record is entred Inter Johannem Cater preſent. hic in Curia by I S Attornatum ſuum, and that cannot be, for it is oppoſitum in objecto. that one can be preſent in Court and alſo by Attorney, ſimul & ſemel, for the Attorney is to ſupply the default of the perſonal preſence. To which it was ſaid by Wray, Anderſon and Periam, that the matter aſſigned was no Error, for there are many Preſidents in the Exchequer of ſuch Entries, which were openly ſhewed in Court. 48 E 3. 10. R 2. 20 H 7. 20 H 8. And by Manwood cheif Baron it is not ſo abſurd an Entry as it hath been objected, for if one hath an Attorney of Record in the Kings Bench, and he himſelf is in the Marſhalſey, there in an Action againſt him, he is preſent as Priſoner, and alſo by Attorney; and by them, notwithſtanding that here appeareth a contrariety, for ſuch entire property (preſentem hic in Curia in propriâ perſona ſua) yet becauſe many proceedings are according, it is the more ſafe courſe to follow them, for if this Judgment be reverſed for this cauſe, many Records ſhould be alſo reverſed which ſhould be very perillous: Another Error was aſſigned, becauſe it is not alledged in the Replication, of what date the Privy Seal was, nor that any notice of the ſaid Privy Seal was given to Sir Francis, to which it was ſaid, that the Privy Seal need not any date eſpecially in this caſe, for the matters which are under the Privy Seal are not iſſuable. See 2 Eliz. Dyer. 177. nor any traverſe can be taken to it, and this Privy Seal is not as other Writs and Præcipes are, returnable in any Court, but the Queen her ſelf from whom originally it came ſhall receive it, and alſo the Meſſage upon it, and ſhe her ſelf in ſuch caſe is Judge of the contempt, and no Record of that Privy Seal doth remain in any Court, but the Queen her ſelf ſhall keep it, and then when the Queen is informed of the contempt, ſhe makes a Warrant ſometimes to the Chancellor to award a Commiſſion, ſometimes to the Treaſurer and Barons of the Exchequer to the ſame purpoſe to ſeize the Lands, and that Warrant is ſigned, with the Seal manual of the Queen, and the Queen may certifie, and ſet down the cauſe of ſuch ſeizure in ſuch Warrant, and no other Certificate is made by the Queen, and the Queen may certifie the ſame Commiſſion by word of mouth, and if the other party will ſay, that the Queen hath not certified it, he ſhall be concluded by the commiſſion which is under the great Seal, and diverſe Preſi-

Intruſion.

Error.

Privy Seal.

dents were ſhewed openly in Court to that effect. And all the matter afozeſaid, was agreed by the Chancellor, Treaſurer, and the ſaid Juſtices, and no certificate at all needs to be in the Caſe, and then a ſuperfluous Certificate being nought, ſhall not part: for Nugation is ſurpluſage. Another matter was to conſider, what intereſt the Queen hath in the Lands of Fugitives by the common Law; And as to that they were all clear of opinion, that the Queen in ſuch caſe as afozeſaid may ſeiſe, and aſſigne her intereſt over: And that ſuch Aſſignees may grant Copy-holds, parcell of the Manor aſſigned, which grants ſhall bind him who cometh in after, cum manus Domini regis amoventur, and alſo when the Statutes of 13. and 14. of Eliz. come, the Statutes doe not amend the eſtate of the Queen, but the eſtate of the Queen doth continue as befoze, and all the Eſtates under it. And there was ſhewed unto the Court diverſe Pzeſidents of ſeiſures in ſuch Caſes, 18. E. 2. Edmond de Wooſtock, Earle of Kent went beyond Sea without License of the King, and he went with Robert de Mortimer, and the King did certifie the ſame into the Chancery, reciting that he had ſent his Pzivy Seal, &c. but that the ſaid Edmond (ſpretis mandatis noſtris redire recuſavit) upon which iſſued a commiſſion to ſeiſe, &c. And it was holden that the Queen having ſeiſed by by fozce of the common Law, and making a grant of a Copy-hold out of it, now when the Statute of 13. & 14. Eliz. are made, ſhee hath not any eſtate thereby, foz ſhee had ſuch intereſt befoze, and this new ſeiſure after the Statutes wozks nothing, and nothing accrues to her thereby, whereof ſhee can make a ſeiſure: Foz ſhee hath departed with the whole befoze, See 23. Eliz. Dyer, 376. And note, that the grant of the Queen in the caſe at Bar was, quamdiu in manibus noſtris fore contigerit. And afterwards Judgement was given, that judicium predictum in omibns affirmetur.

Fugitives.

Ter. Mich. 25. and 26. *Eliz.* in the Common Pleas.

XIII. *Sutton*, and *Dowſes* Caſe.

SUtton, Vicar of Longſtoke, Libelled againſt Dowſe in the ſpirituall Court, and ſhewed in his Libel, that upon the Erection and Endowment of his Vicaridge, four quarters of Cozne were aſſigned to the Vicar out of the Granary of the Pzioz of B, of the Tithes of the Parſonage of Longſtoke, and that the Parſon oz Fermoz of the ſaid Rectozy of Longſtoke, had alwayes paid the ſaid four Quarters of Cozne to the ſaid Vicar and all his Pzedeceſſozs, and alleadged further, that the Lozd Sands was ſeiſed of the ſaid Rectozy, and leaſed the Barne and Tithe-Cozne parcell of the ſaid Rectozy, to the ſaid Dowſe, his Wife, and Son, Habendum to Dowſe foz Terme of his life, the Remainder to the Wife foz Terme of her life, the Remainder to the Son foz life: And ſhewed further, that the ſaid Dowſe had covenanted with the ſaid Lozd Sands, to render the ſaid four Quarters of Wheate to the Vicar and his Succeſſozs, upon which Dowſe pzocured a pzohibition, and Sutton pzayed a conſultation, and it was moved in ſtay of the conſultation that the Vicar had Libelled upon a Covenant which Dowſe is taxed to pay the ſaid Cozne, and that is a lay Title, and determinable by the Law of the Land, and not in the Eccleſiaſticall Court: But as to that the opinion of the Court was, that the Libel is not grounded upon the covenant, as the ſole Title to the ſaid Cozne againſt Dowſe, but upon the Endowment of the Vicaridge, and the Leaſe by which Dowſe is become Fermoz of the Rectory: Another matter was moved, becauſe that upon the Libel it appeareth, that the Leaſe afozeſaid made by the Lozd Sands was made to Dowſe his Wife, and his Son, joyntly, in the Pzemiſſes, Habendum ut ſupra, in which caſe it was objected, that Dowſe his Wife, and his Son, are all three Fermozs of the ſaid Barne and Tithes joyntly in poſſeſſion, againſt all whom Sut-

Tithes.

ton

ton ought to have Libelled, &c. and not againſt Dowſe only, for the Habendum hath not ſevered their eſtates which were joynt before, quod tota curia negavit, for the Habendum hath ſevered the joynt eſtates limited by the Premiſſes, and hath diſtinguiſhed it into Remainders, but if the Habendum had been, Habendum ſucceſſive, the eſtate had remained joynt: Another matter was moved, becauſe it appeareth upon the Libel, that the Parſon, or Fermor of the ſaid Rectory ought to pay to the Vicar the ſaid Corne, and alſo it appeareth upon the matter that Dowſe is not Parſon, nor Fermor of the ſaid Rectory, for the Lord Sands had leaſed to Dowſe and his Son, but the Barne and the Tithe-Corne parcell of the ſaid Rectory; ſo as Dowſe is Fermor but of parcel of the Rectory, & the reſidue of the Rectory doth remaine in the Lord Sands, in which caſe the ſaid Sut. ought to have Libelled againſt the Lord Sands, and Dowſe, and not againſt Dowſe only; And for that cauſe the conſultation was denyed. And in this caſe it was further agreed by the Court, that if upon a Libel in the ſpirituall Court, the Defendant makes a ſurmiſe in Banco to have a Prohibition, if ſuch ſurmiſe be inſufficient, the other party needeth not to demur upon it, and to have it entred upon Record, but as amicus Curiæ, he ſhall ſhew the ſame to the Court, and the Court ſhall diſcharge him.

Mich. 25. and 26. *Eliz.* In the Kings Bench.

XIV. *Punſany*, and *Leaders* Caſe.

OSmond Punſany brought an Action upon the caſe againſt Leader, and declared, that one Bedingfeild was ſeiſed of the Manor of D, and that he and all thoſe whoſe eſtate he hath in the ſaid Manor, time out of mind have had, libertatem Faldagij, & curſum omnium, in the Town of D, & pro metiori paſturatione omnium ſuorum, the Inhabitants of the ſaid Towne having any Lands within the ſaid Towne, every ſecond yeare left their Lands to lye freſh and untilled, and preſcribed further, that the Tenants of the Lands within the ſaid Towne might erect Herdals in their Lands, with the License of the Lord of the ſaid Manor, and not otherwiſe: and further declared, that the ſaid Bedingfeild had let to him the ſaid Manor, and that the Defendant had erected Herdals upon his Lands without License, ſo as the profit of his Foldage is impayred by it: And all this matter was found by Verdict: And it was objected in ſtay of Judgement, that the preſcription is not good, for it is againſt Law and common right to abridge the Subject of the profits of his Lands: But the whole Court was clear of opinion, that the preſcription is good enough, as 15. E. 2. Preſcription 51. Preſcription to have common appendant in other Land after that the Hay is cut, and v. E. 1. Preſcription, 55. A ſeiſed of Lands may Plow it and Sow it, and cut and carry away the Corne, and afterwards when the Corne is carryed, B by preſcription may have the ſaid Land as his ſeveral, and the other who ſowed it cannot meddle with that land, but to plough and ſow it in ſeaſon, &c. And the Cattell cannot eat and paſture in the Land when they come to plow or ſow it, or to carry it away, nor have any profit but the Corne, and yet the Freehold of the Land is in ſuch perſon, &c. and that was holden a good Preſcription, and a difference was taken by the Court, where one doth preſcribe to take away the whole intereſt of the Owner of the Land, and where a particular profit is reſtrained: And here this preſcription doth not extend but to reſtraine the Tertenant to erect Herdals, which is a reaſonable preſcription, See 1. H. 7. 24. The Lord of the Towne doth preſcribe to have free Foldage of the Beaſts of his Tenants in D, and ſee there, that libera Falda is not any other, but to have the Beaſts of the Tenants to manure the lands of the Lord, &c. And afterwards Punſany the Plaintiff had Judgement to recover.

Preſcription of Foldage.

XVI. *Mich.* twenty five, and twenty six *Eliz.* at Serjeants Inn.

IN the Dutchy Chamber, the case was, that King E. 6. leased for yeares certaine lands parcel of his Dutchy of Lancaster, rendring rent with clause of reentry, and that lease was made to one Bunny; It was found by Office that the Rent was arrear, and by another Office, that the Servant of the said Lessee, had tendred the rent in the absence, and by the commandment of his Master and that afterwards one I S Receiver Generall of the Dutchy, received the said Rent, and had accounted for it, and upon his account it was allowed; And this matter was opened at Serjeants Inn in Fleet-street, before Wray, Anderson, Manwood, Clench, Rhodes, Plowden, and Stanhop, and it was argued by Shutleworth, that in this case of rent reserved upon Lease for years, made by the King of Dutchy-Land, the King is not bound to demand it, but he may for default of payment of it, reenter without demand, & that the Lessee is tyed to tender it at his peril, as wel as if the Queen had been seised of the said land in the right of her Crown, and as to that payment, the Statute of 1. H. 4. is to be considered, by which it is enacted, that the possessions of the said Dutchy Taliter, & tali modo, & per tales officiarios & ministros in omnibus remaneant, deducantur, & gubernentur sicut remanere, deduci, & gubernari debuissent, si ad culmen Regis Dignitatis assumpti non fuissemus, and these words ought to be intended of things which concerne the Lands themselves, but this act of demand is a personall thing, and concernes the person of the King, and toucheth the Majesty, and dignity of the King, and in all cases of the Dutchy the person of the King shall hold his priviledge, notwithstanding that the possession of the Land be carryed in the course of a private person: And therefore if the Queen will alien Lands parcell of her Dutchy, shee ought to make Livery, for now shee medles with the possession it selfe: but if the Queen will sue for parcell of her Dutchy, non omittas shall be in the Writ, for shee cannot sue but as Queen, and the Queen hath such Prerogative, that none shall execute her Writs at her own suite, but the Officer of the Crowne, 21. E 4. 60. for Livery if it be not Land within the County Palatine, and for the residue, See 10. H. 4. 7. 3. Eliz. 216, 217. Plowden, Lessee for years of Lands of the Dutchy, shall have aid of the King before Issue joyned, &c. And if the King make a Feoffment of Lands of his Dutchy out of the County Palatine, to hold of him in Capite, the Feoffee shall hold it so, and a Feoffment of such Lands upon condition that the Feoffee shall not alien is a good condition, and Lapses shall not binde the Queen in case of an Advowson which the Queen hath in the right of the Dutchy, and if the villain of the Queen in the right of the Dutchy purchaseth Lands in Fee, and aliens, yet the Queen shall seise, and that hath been adjudged in the Exchequer Chamber, and if the Queen make a Lease of such Land, and afterwards makes another Lease of the same Land without recitall of the first Lease, it hath been adjudged that the second Lease is void. It was argued contrary by Beamount the younger, that this condition which goeth to the realty, to reduce the Land againe, ought to be ordered and governed by the Queen, as it ought to be by a Subject; and therefore, if the Queen will take advantage of this condition, shee ought to make a Letter of Attorney under the Dutchy Seal, to her own Officer, authorizing him thereby to make demand of the said Rent, &c. And by Shutleworth here be two Offices, the one contrary to the other, the best shall be taken for the Queen, 14. E. 4. 5. in Skreems Case in the end of it: And if the Rent of the Kings Farmer be behind, now although that after the Receiver of the Dutchy doth receive it, yet the same doth not purge the forfeiture, as if the Bayliffs of a Mannor receive rent of a new Feoffee, the same will not change the Avowry of the Lord without notice given to him, 41. E. 3. 26. And if a Copyhold escheat,

The King not bound to demand Rent.

escheat, the Steward without a special Warrant cannot grant it over De novo.

Mich. 25, and 26. *Eliz.* in the Kings Bench.

XVI. Rearsbie *and* Rearsbies *Case* Intrat. Trinit. 25 Eliz. rot. 746.

REplevin by W Rearsbie and A Rearsbie, against L Rearsbie, who avow the distresse, because that one W Vavasour was seised of the Mannor of Deniby, whereof the place where, &c. is parcel in his Demesne as of Fee, and so seised gave the said Mannor to one L Rearsbie Father of the Plaintiff, and of the Avowants and Jane his Wife, and to the Heirs of Lyonel, who by his Will devised unto A Rearsbie a Rent of four pounds out of the said Mannor, with clause of distresse, for his childs part, to be yearly paid, Lyonell the Father dyed 3. Eliz. and afterwards, 22. Eliz. Jane dyed, and for the arrearages of the said Rent encurred mean between the death of Lyonel and Jane his Wife, &c. upon which Avowry the Plaintiff did demurre in Law, for the Rent doth not begin in effect, but after the death of the Wife of the Devisor, for such construction ought to be made of the Devise, as not to charge the Inheritance with the whole arrearages, &c. and it was argued to the contrary, that the Defendant might well avow the distresse for these arrearages; for if he in the Reversion upon a Lease for life grant a Rent charge after the death of the Grantor, the Grantee shall distrein for all the arrearages encurred after the grant, etiam, during the life of the Grantor, quod Curia concessit: and it was said by the Councel of the Avowant, that the Case at Bar is a stronger Case, for this Rent, as it appeareth by the words of the Devise, was devised to the Avowant for his livelihood, and for his childs part which words imply a present advancement, and these words yearly to be paid is strong and pregnant to that intent. It was adjourned.

Construction of Devisor.

Distresse.

XVII. *Hill.* 25. *Eliz.* in the Kings Bench.

THe Earl of Northumberland brought debt upon arrearages of Action, the Defendant shewed that before the Account, the Plaintiff of his own wrong did imprison the Defendant, and assigned Auditors to him being in prison, and so the Account was made by duresse of imprisonment: And the same was holden a good Plea by all the Justices of both the Benches. And Judgment was given accordingly.

Account.

XVIII. *Pasch.* 26. *Eliz.* in the Kings Bench.

Pasch. 26. Eliz.

Forman *and* Bohans *Case.*

REplevin by Forman against Bohan, the Defendant avowed for a Rent charge, and shewed, that one Wingfield was seised of the Mannor of Wesham, whereof the place where, was parcel: And 33. H 6. made a Feoffment in Fee of the place where, &c. to one Orlow, rendering Rent and suit at the Court of the said Mannor, and that the said Wingfield was seised of the said Rent and Sute accordingly, and dyed thereof seised, and that the same descended to Anthony Wingfield as Son and Heir, &c. who was seised of the said Rent as parcel of the said Mannor, and that the said Anthony, so seised of the said Mannor and Rent, bargained and sold the said Mannor & Rent, 26. H 8. to Nicholas Bohan Father of the Avowant, by these words; Manerium de Wesham, et omnes omnimodas redditus, reputed, deemed, or adjudged part or parcel of the said Mannor, who entred, and died seised, and the same descended to the now Avowant, as Son and Heir,

Replevin.

heir, &c. and avered, that the said Rent at the time of the bargain and sale aforesaid, et diu ante, was reputed parcel of the Mannor aforesaid: Upon which Avowry, the Plaintiff did demurre in Law, and it was argued by Gawdy Serjeant for the Plaintiff, and he took an Exception to the Avowry, because the Avowant sheweth, that Anthony Wingfield 26. H 8. bargained and sold the said Mannor to Bohan Virtute Quar. bargaine et venditionis, et vigor. cujusdem Actus Parliamenti 27. H 8. de usibus, &c. the said Bohan was seised, &c. where he ought to have said; by force of which bargain and sale the said Anthony Wingfield was seised of the said Mannor aforesaid, to the use of the said Bohan, and that afterwards by reason of the said Statute of 27. H 8. the said Anthony then seised to the use aforesaid, the said Bohan was seised in his Demesne as of Fee: For it might be for any thing appearing in the Avowry, that before the said Statute of 27. H 8. Anthony Wingfield had made a conveyance upon consideration to him who had not notice of the use, so as the use being suspended, when the Statute came, it could not be executed, for there was not any seisin to the use, and to that purpose he cited the Case of 7. H 7.3. where a gift of Trees by Cestuy que use is pleaded, without alledging that the Feoffors were seised to the use of the Donor at the time of the gift: To that Exception it was answered by Popham Attorney General, That there is a difference betwixt the Case at Barre, and the Case of 7. H 7. for where a man entitles himself by Cestuy que use, he ought to maintain such title by every necessary Circumstance, which the Law without expressing will not intend, but where a man alledgeth a matter, which is but a conveyance, there needs no especial recital; as if a man will pretend the grant of a Reversion, & that the lessee for years did attorn, he needs not to shew, that at the time of the Attornment the Grantor was seised, &c. and he cited the Case of 10. E 4. 18. In Trespasse, the Plaintiff by way of Replication made to him a title, that A was seised and leased to him at Will, by force of which the Plaintiff was possessed, until the Defendant did the Trespasse, and Exception was taken to it, that the Plaintiff in his Replication had not avered, that A was alive at the time of Trespasse, and it was not allowed, for the subsequent words (by force of which the Plaintiff was possessed until the Defendant did the Trespasse) do amount unto so much, for the Plaintiff could not be possessed by force of the said Lease at Will, if A were not alive. So here, Bohan could not be here seised by force of the said Statute, if the seisin of the use which was raised by the bargain and sale had not continued until the comming of the said Statute: As to the matter in Law, Gawdy conceived that the averment in the purchase of the Avowry is contrary to the matter of the Avowry, for the creation of the Rent set forth in the Avowry proves, that the Rent is not parcel of the Mannor, but a Rent in grosse, and then the general averment, that the Rent is parcel of the Mannor, without shewing how, against the special matter of the Avowry, is not receivable. And also nothing can be by reputation parcel of a Mannor which in rei veritate cannot be parcel of a Mannor, but a Rent charge cannot be in rei veritate parcel of a Mannor, ergo, nor by reputation: Popham contrary; That the averment is not contrary to the matter of the Avowry, for the matter disclosed in the Avowry proves, that it is not rei veritate parcel of the Mannor, but it doth not exclude Reputation, and the Averment doth not extend ad veritatem facti, which is set forth in the Avowry, but only to reputation, and so both stand together well enough: And that a Rent charge may be parcel of a Mannor, see 22. E 3. 13. 31. E 3. 23. in the Lord Tiptofts Case, where it is ruled, that title made to a Rent charge as parcel of a Mannor is a good title, and the Assize awarded upon it, and in our Case the Reputation is enforced by the suit at the Court, which was also reserved upon the said Feoffment together with the said Rent, so as the intent of the parties to the Feoffment was, that this Rent so reserved and accompanyed with the said suit shall be esteemed a Rent service, and so parcel of the Mannor, and as to the continuance of Reputation it sufficeth, if at the time of the

Averment.

Reputation.

Rent charge parcel of a Mannor.

the

the bargain and sale aforesaid, which was 26. H 8. it was by many reputed parcel of the Mannor, and he cited the Case of the Marquesse of Winchester: The King gave to his Ancestor the Mannor of Dale and all lands then antea reputed parcel of the said Mannor, and in a Bill of Intrusion against the said Marquesse he pleaded the grant with averment, that the Land then antea reputed parcel Manerii predict. And because he did not shew certainly at what time the Land was reputed parcel of the Mannor, Judgment was given for the Queen, for it might be for any thing in his Plea, that the said Land was reputed parcel of the said Mannor before time of memory, which Reputation would not serve: but such Reputation ought to be within time of memory and understanding: He cited also the Case of the Earl of Leicester. King Edward the sixth seised of the Mannor of Clibery, of which a Wood was parcel, granted the said Wood in Fee, which afterwards escheated to the King for Treason; Queen Mary granted the said Wood to another in Fee, who granted it to the now Queen, who granted the said Mannor & omnes boscos modo vel ante hac cognit. vel reputat. ut pars, membr. vel parcel. Maner. predict. to the Earl of Leicester, and it was resolved in the Exchequer, that by that grant the said Wood did passe to the Earl, and Judgment was given against the Queen, for it was part of the Mannor in the time of E 6. at which time (ant' hac) without the word (unquam) shall be extended ad quodamcunque tempus præteritum. And Reputation needs not so ancient a Pedigree for to establish it; for generall acceptance will produce reputation: As the house of the Lord Treasurer now called Tibould was now of late a private Mannor, but now hath a new name by which it is known, and that within these twenty years, which is not so long a time as we have alledged for our Reputation, and would passe in a conveyance by such name, so None-such. But as to Reputation, I conceive that Reputation is not what this or what that man thinketh, but that which many men have said or thought, who have more reason to know it; & quænam est inter illos reputatio: There was a Case ruled in the Exchequer 13. Eliz. in a Bill of intrusion; the Case was, that King Hen. 6. was seised of a Mannor, to which a Neife was regardant, who purchased Lands which the King seised, and let by Copy as parcel of the said Mannor, and so continued until the time of E 6. who granted the same to Allice Hardwick, and all Lands, Tenements, reputed parcel of the said Mannor; And it was adjudged, that the said Land so purchased by the said Neife, and demised by Copy, did passe by the said grant to Hardwick. And afterwards, the same Term, the Justices, without any solemn Argument, shewed their opinions in the principal Case, viz. That this Rent did not passe by the bargain and sale made as above, by Anthony Wingfield, to Bohan father of the Avowant; for here in the premisses of the Avowry is not any matter set forth importing Reputation, or by which it may appear that the Rent in question was ever reputed parcel of the said Mannor, but rather to the contrary, and the bare averment if Reputation in the conclusion of the Avowry is not sufficient to induce Reputation. But if the Avowant had set forth in his Avowry any special matter to induce the Court to conceive a Reputation upon the matter of the Avowry, as to shew that the Bayliffs of the said Mannor had alwayes received the said Rent as parcel of the said Mannor, and as Bayliffs of the said Mannor had accounted for it, as parcel of the Mannor, and that the Lessees of the said Mannor had enjoyed the said Rent as parcel of the said Mannor, the same had been good matter to induce a Reputation, and to have incorporated the said Rent with the said Mannor: and so judgment was given against the Avowant; and of such opinion (as was affirmed by Wray) was Anderson, cheif Justice of the Common Pleas, and Manwood, cheif Baron of the Exchequer.

Reputation *quid.*

Pasch.

Pasch. 26. *Eliz.* in the Kings Bench.

XIX. *Cham* and *Dovers* Case.

Ejectione firmæ.

IN an Ejectione firmæ, the Case was, that one Michell was seised of the Mannor of D, within which diverse parcells of Land, part of the said Mannor, were customary Tenements demised and demisable by copy, &c. according to the Custome of the said Mannor for one, two, or three lives, within which Mannor there was a Custome, scil. that the Lord of the Mannor, for the time being, might grant Copy-hold estates for life in Reversion; The Lord granted such Lands for life by copy in possession, tooke a wife, and granted the same Copy-hold to a stranger in Reversion for life, and dyed, the Copy-holder in possession dyed, the Land demised by copy is (inter alia) assigned to the Wife for her Dower, who had Judgement to recover in a Writ of Dower, who entred and made a Lease thereof to the Defendant, who entred, against whom, the Lessee of the Copyholder brought Ejectione firmæ, and all his matter was found by Verdict, and further found, that every Copy-holder of the said Mannor, might Lease his Copy-hold for a yeare, ad pasturandum, sed non ad colendum, and that the Lease made to the Plaintiff was for a year, ad pasturandum. Popham Attorney General, of Councell with the Defendant, tooke exception to the Declaration, because the Plaintiff had declared a Lease at the common Law, and the Jury have found a Lease by the custome which cannot stand together: And such a Verdict doth not maintaine the Declaration, as if the Plaintiff had declared upon a Lease for years of Lands, and the Jury found a devise for years, &c. but the exception was disallowed by the Court: As to the matter in Law he argued, that the Tenant in Dower should hold the Land discharged of the Copy-hold for her life, and he put this case, If the Lord of such a Mannor taketh a Wife, a Copy-holder for life dyeth, the Lord grants a Rent-charge out of the customary land, and afterwards grants the said land by copy for life and dyeth, the wife shall hold the land discharged of the Rent, but the Copy-holder shall be charged, and he put a difference where the Lord grants such Copy-hold in possession, and where in Reversion, for in the first case the Wife shall hold charged, but contrary in the last: And he cited the Case of one Slowman, who being Lord of a Mannor (ut supra) by his Will devised, that his Executors should grant estates by Copy, and dyed having a Wife, the Executors make estates accordingly, the Wife in case of Dower shall avoid them: Plowden contr. the Lord of such a Mannor is bound by recognisance, and afterwards a Copy-holder for life of the said Mannor dyeth, the Lord grants his Copy-hold, de novo, the said new Grantee shall hold his Copy-hold discharged of the Recognisance which Gawdy Justice granted, and by Wray if the Lord of such a Mannor grants a Copy-hold for three lives, takes a Wife, the three lives end, the Lord enters and keeps the lands for a time, and afterwards grants them over againe by copy, and dyeth, the copy-holder shall hold the land discharged of the Dower, and this is a clear case, for the copy-holder is in by the custome which is paramount, the title of Dower and the Seisin of the Husband, and by him in the case of the Earle of Northumberland, 17. Eliz. Dyer 344. That the grant of a copy-hold in Reversion by the Earle of Northumberland, doth not make such an impediment as was intended in the condition there, for it is by the custome, and not by the act of the partie; And afterwards, the same Terme Judgement was given for the Plaintiff, that he and his Lessor should hold the lands discharged of the Dower.

Custome, ad pasturandum non ad colendum.

Dower, discharged of a grant of Copy-hold.

Pasch.

Pasch. twenty six *Eliz.* In the Kings Bench.

XX. *Fringe* and *Lewes* Case.

DEbt by Fringe against Lewes upon a Bond, who pleaded, that the condition was, that whereas the Defendant was Executor to one Morris Degle, that if the Defendant should performe, observe, fulfill, and keep the Will of the said Morris Degle in all points and Articles, according to the true intent and meaning thereof, that then, &c. and pleaded further, that the said Morris by the said Will bequeathed to the Poore of such a Towne ten pounds, to be distributed amongst them, and also to the Church-wardens of the Parish ten pounds, and to I S three pounds, and that he had distributed the said ten pounds to the Poore, and that he had paid the ten pounds to the Church-wardens, and as to three pounds, he said that he is and alwayes was ready to pay the same to the said I S if he had demanded it, upon which there was a demurrer: And as to the ten pounds to be distributed amongst the Poor, the same was holden good enough without shewing the names of the Poore amongst whom the mony was distributed; so the pleading of the first payment to the Church-wardens was holden sufficient without naming of them, See 42 E. 3. breif, 539. Scire facias out of a Recovery against Executors, and the Writ was challenged, because it was, Scire facias Executez, not naming their proper names; It was holden to be no exception, for Executors are as a corporation known in that, they are Executors and as to the third part of the Plea, scil. alwaies ready and yet is, the plea is well enough, for this Obligation (the Condition of which being general to performe the Will &c.) hath not altered the nature of the payment of the Legacy, but the same remains payable in such manner as before upon request, and not at the peril of the Defendant. See 22 H 6. 57 58. 11 E 4. 10. 6 E 6 Br. Tender 60. And afterwards the same Terme, the Court was clear of Opinion, and so delivered the Law to the Counsell on both sides, that in this case the Legacies are to be paid upon request, and not at the peril of the Executors in such manner as they were before the Obligation, and afterwards Judgement was given against the Plaintiff.

Debt.

Uncore prist. a good Plea.

Pasch. 26. Eliz. *In the Kings Bench.*

XXI. *Sir* John Smith, *and* Peazes *Case.*

SIr John Smith brought Debt upon an Obligation against Peaze, who pleaded, that the Bond was upon condition to performe covenants contained in an Indenture, and shewed what, and that he had performed them, the Plaintiff assigned the breach of one covenant, that where the Plaintiff had leased to the Defendant for yeares, certaine messuages by the same Indenture, the Defendant by the same Indenture did covenant to repair all the said Messuages, alia quam quæ appunctuaræ forent divelli præscript. dicti Johannis Smith, and shewed further, that the Defendant had not repaired the said Messuages to him demised as aforesaid, and averred that the said house in which the breach of the covenant is assigned, non fuit durante termino predicto appunctuata divelli, and upon that matter of replication they were at Issue, and found for the Plaintiff: It was moved in Arrest of Judgement, that the Averment in the Replication was not sufficient, for the Lease was made in November to begin the Michael. after, and it might be that the Messuage, in the not repayring of which the breach of the covenant is assigned, was appointented to be pulled down, scil. divelli, before the Terme for years began, and then the Defendant is not bound to repair it, and then the breach of the covenant is not well assigned, and so the Averment

Covenant.

Averment.

ment doth not answer the exception, and because this clause (alia quam) is in the body of the Covenant, it ought to be satisfied by him who pleads it, scil. by him who assignes the breach in the Covenant, in which the exception is contained; as by the Lord Dyer in his argument, in the argument of Stowels Case, reported by Plowden 376. Where a man pleaded the Feoffment of Cestuy que use, he ought to plead, that Cestuy que use, at the time of the Feoffment was of full age, sanæ memoriæ, &c. for that is within the purview, contra upon the Statute of 4. H. 7. in pleading of a Fine, for that is in a clause by it selfe, which conceit of Plowden, the Lord Wray denyed to be Law, for he said, he that pleads the Feoffment of Cestuy que use, or a Fine according to the Statute of 4. H. 7. shall not be driven to shew that the Feoffor, or Conusee at the time of the Feoffment, or Fine levyed was of full age, &c. but he who comes in by such Fine, or Feoffment shall shew the same for his own advantage; and at last after many motions it was resolved by all the Justices, that the Averment aforesaid was superfluous & ex abundanti, for it had been sufficient for the Plaintiff to have assigned the breach of the Covenant in the not repayring of Messuage without any Averment. de non appunctuando, and if the house in the not repayring of which the breach of Covenant is assigned, was appointed to be pulled down, the same shall come in on the Defendants part to whose advantage it trencheth, for such appointment doth discharge the Covenant as to that: In the same Plea, it was moved in stay of Judgement, that one Sharpe, Solicitor of the said Sir John in the said suit, had given eight shillings to the Jurors mean betwixt the Charge, and their Verdict, and that matter was testified by the oaths of two men, upon which the Court examined the said Sharpe, who upon his oath denyed the matter, and also the Foreman of the Jury to whom the mony was supposed to be given, who upon his oath denyed the same: And it was moved, if receipt of money by any of the Jurors should make the Verdict void; and by Wray it shall not, for it is but a Misde meanor, which is punishable on the person of him who takes the mony: But Gawdy and Ayliff Justices, the Verdict is void. See 24. E. 3. 24. 14 H. 7. 1. 20 H. 7. 30. And for that cause the Judgement was reversed.

Averment where superfluous.

Pasch. 26 *Eliz.* *Intr. Trin.* 25. *Eliz.* *Rot.* 492. In the Kings Bench.

XXII. *Cordall* and *Gibbons* Case.

IN an Ejectione firmæ, upon not guilty pleaded this Jury found the speciall matter, viz. that one Hierom Heydon was seised of two Messuages, whereof the Action is brought, and came to Cordall the Plaintiff, and prayed him to lend him ten pounds, Cordall asked him, what assurance he would give him for the re-payment of it, he answered, that he would morgage to him the said two Messuages, whereupon Cordal lent him the mony, and afterwards they both went to the said two Houses, and being before the doors, of them, Heydon called Tenants at will of the Houses, and said to them, Sirs, I have borrowed of this Cordall ten pounds upon these Houses, and if I pay this mony at Michaelmas next, I must have my Houses againe, and if not, then I bargaine and sell these Houses to Cordall, and my will is, that you become his Tenants, after which Heydon put the said Cordall into the Houses, and seeing him in the Houses, he put in the Keyes of the Houses to the said Cordall, by the Windowes, &c. And it was adjudged by the whole Court, that this conveyance, by word of mouth, was good enough to passe the estate, ut supra, and the words of bargaine and sale in this Case, are as strong, as of guift and grant, See 38 E. 3. 11. 43 E. 3. 11. 27 E. 3. 62. 28 E. 3. 11.

Pasch.

Pasch. 26. *Eliz. Intr. Mich.* 25. & 26. *Eliz. Rot.* 72. In the Kings Bench.

XXIII. *Richards* and *Bartlets* Case.

DOrothy Richards Executrix of A, her former Husband, brought an Action upon the Case upon a promise against Humfrey Bartlet, and declared, that in consideration of two weighes of Corn delivered by the Testator to the Defendant, he did promise to pay to the Plaintiff ten pounds, to which the Defendant said, that after the Assumpsit the Plaintiff in consideration, that the said two weighes were drowned by Tempest, and in consideration that the Defendant would pay to the Plaintiff for every twenty shillings of the said ten pounds three shillings four pence, scil. in toto thirty three shillings four pence, did discharge the said Defendant of the said promise, and averred further, that he hath been alwayes ready to pay the said sum newly agreed, upon which there was a demurrer. And the opinion of the whole Court was clearly with the Plaintiff, first because that here is not any consideration set forth in the Bar, by reason whereof the Plaintiff should discharge the defendant of this matter, for no profit but damage comes to the Plaintiff by this new agreement, and the Defendant is not put to any labour or charge by it, therefore here is not any agreement to bind the Plaintiff, See 19 H.6. Accord, 1. 9 E.4. 13. 12 H. 7. 15. See also Onlies Case, 19. Eliz. Dyer, then admitting, that the agreement had been sufficient, yet because, it is not executed, it is not any Bar: And afterwards Judgement was given for the Plaintiff. Assumpsit.

Pasch. 26. *Eliz.* In the Kings Bench.

XXIV. *Lendall*, and *Pinfolds* Case.

IN Trespasse for breaking of his Close, by Lendal against Pinfold, the Case was that, two brake the Close and entred, & did the Trespas, the Owner of the land brought an Action of Trespasse against one of them, and had Judgement, and execution accordingly, and afterwards brought Trespass against the other, and declared upon the same Trespasse: And by Ayliff Justice, it is a good Bar, and he likned it to the case of one Cobham, who brought an Action of Trespasse of Assault and Battery, and recovered and had execution, and afterwards brought an Appeal of Mayhem against the same person upon the same matter, the said Recovery and execution is a good Bar, &c. so here as to the breaking of the close, but not as to the Entry: But by Wray, it is a good Bar for the whole, and he likened it to the case of Littleton, Pl. 376. A Release to one of the Trespassers, shall discharge both, Gawdy agreed in opinion with Ayliff. Trespasse. Bar.

Pasch. 26. *Eliz.* In the Exchequer.

XXV. *Kempe*, and *Hollingbrooks* Case.

IN an Ejectione firmæ for Tythes, the case was upon the Statute of 18. Eliz. Cap. 6. By which it is enacted, that no Masters, and Fellowes of any Colledge in Cambridge, or Oxford shall make any Lease for life, or years of any Farme, or of any their Lands, Tenements, or other Hereditaments to the which any Tythes, arrable Land, Meadow, or Pasture doth, or shall appertaine, unlesse the third part at least of the ancient Rent be reserved, and payed Tithes.

in Corne for the said Colledges, &c. otherwise every Lease without such Reservation shall be void, &c. If now, the said Statute shall be construed to extend to Leases of such extraordinary pecuniary Tithes which are not naturall or paid in kind. It was argued, that the said Statute is to be intended of Tithes in kind, and also of such things to be demised which render Corne, Hay, &c. But the Tithes in London which is the thing demised in our case, doth not render any such thing, but only mony accruing to the decree made for the payment of Tithes in London in the time of E. 6. And although the words of the Statute be (other Hereditaments) to the which any Tithes, &c. Yet the said Statute doth extend to Tithes in grosse, but they ought to be such Tithes which are of such nature as Tithe-corn, and Tith-hay: And Manhood chief Baron held clearly, that the Lease of these Tithes is good enough, notwithstanding the defect by the speciall Reservation which is limited and appointed by the Statute, and so by him, a Lease of a House, Rent, Mill, Ferry, &c. are out of the said Statute: And as to the Tithes, notwithstanding the words of the Statute are generall, any Tithes; yet he conceived, the Statute ought to be intended of Tithes of common Right, and not of such customary Tithes as those of London are, and therefore, if all the Parishoners prescribe in modo Decimondi, scil. to pay a certaine sum of mony for all manner of Tithes, upon demise of such a Rectory, such speciall Reservation is not necessary, for these are Tithes against common Right, and no Tithes are within the purview of the said Statute, but those which are annuall, and therefore a Lease of Tithe-wood is out of the meaning of this Statute, for non renovantur in annum, and he said that upon a Lease of the Tithes of Chirryes, a rent ought to be reserved according to the Statute, and the Farmer may bring his Chirries to the Market, and buy Corne. Suit Justice contrary, for the words of the Statute are generall, and note, that this Lease was of the Rectory of Saint Lawrence in the City of London, there was another matter moved in this case, because the lease whereof the Action is brought, was made by the name of Master or Guardian, and the Fellowes, whereas the true name of their Colledge is Master and Fellowes. And it was argued by Atkinson, that the same is not such a Misnosmer which makes the Lease void, for (sive custos) are words of surplusage, v. 7. H. 6. 13. And also the case of the Cookes, 20. Eliz. Plow. 531. The Corporation was by the name of Masters or Governors and Comonalty, mysteriæ coquorum, &c. And they made a conveyance by the name of Masters or Governors, and Comonalty, artis sive Mysteriæ, &c. the same is no such Misnosmer as shall make void the conveyance, for Art and Mistery are both of one sense.

Tithes in *London.*

Misnosmer.

Pasch. 26. *Eliz.* In the Kings Bench.

XXVI. *Harvey*, and *Harveys* Case.

Consultation. CLare Harvey, one of the Daughters of Sir James Harvy Alderman of London Libelled in the Spirituall Court against Sebastian Harvy, Son and Executor of the said Sir Iames, for a Legacy bequeathed to her by her Father; Sebastian did not appear, for which he was excommunicated and taken by a Writ of excommunicat. capiendo, and imprisoned, and afterwards he came into this Court, and surmised to the Court, That the said Sir James in his life had given to the said Sebastian all his Goods and Chattells, and was also bound unto the said Sebastian in Statute-staple of two thousand pounds, whereupon he had a prohibition, and now the Plaintiffs councell prayed a consultation, quatenus non agitur ad validitatem facti, aut Statuti. And Egerton Solicitor of Councell with the Plaintiff cited a Judgment given in the like Case betwixt Lodge and Ludington, where such a special consultation was granted: But Wray put a difference betwixt the said Case and the Case at Barre, for here in this Case is a gift by the Testator

Testator himself, but in the Case cited, the gift was by the Executor; and also here is a Statute of two thousand pounds, in which Case the Obligations which could not passe by the deed, shall be subject to the said Statute.

Trin. 26. *Eliz.* in the Exchequer.

XXVII. *The Duke of* Northumberlands *Case.*

Bargain and sale.

The late Duke of Northamberland seised of five Messuages in the Parish of St. Sepulchres London, in the Tenure of W Gardiner, by deed indented and enrolled for money bargained and sold to I L all his Tenements scituate in the Parish of St. Andrews in Holborne in the Tenure of W Gardiner, to have to the said I L for life, the remainder to K his Daughter in Fee: Atkinson, The bargain and sale is void by reason of the Misnosmer of the Parish, notwithstanding the truth of the Tenure, for by the grant and bargain and sale of all his Tenements in the Parish of St. Andrews nothing passeth, and the truth of the Tenure subsequent shall not help it: And by Manwood chief Baron, the sale is utterly void, for the falsity doth proceed the truth a certainty: And it was argued, that I L entring by colour of the same bargain and sale is a disseisor; as the Case is betwixt Croft and Howel, 20. Eliz. Com. 527. Yet if he was but Tenant at Will when he made the Lease for years, the same was a Disseisin to the said Duke; and then the Duke being disseised, he is attainted of treason, 10. Mariæ. And now we are to see what things accrue to the Queen by the said Attainder: and as to that it was said, that at the Common Law a Right of Entry, should Escheat, but not without office found thereof, no more then Lands in possession: And by the Statute of 26. H 8. it is enacted, that every person attainted of high treason, shall forfeit all his Lands and Tenements which he had of any estate of Inheritance, by which Statute a Bishop, Abbot or Tenant in tayl in such Case shall forfeit even without Office: But in the Statute of 33. H 8. there is a saving to every other person all such right possession, so as in that Case by that Statute the King shall not be in possession without Office, but shall have a right, but cannot enter before Office or after. And he is to have a Sci. facias against him, who hath the possession, and he shall make his defence as well as he can, and the words of the said Statute, That the King shall be in actual possession, shall not be construed to extend to an actual and absolute possession, but such a possession only which he had at the Common Law after Office found, so as the Statute doth not give to the King a larger possession but easier, without the circumstance of an Office: And of that opinion was Manwood chief Baron, and Shute second Baron: And then it was moved further by Cook, because that the Queen by the Attainder hath but a Right; and the Queen makes the grant of the Messuages themselves, the same grant is void. And he granted that the Queen might grant a real Action, and a Right of Entry; but such a grant ought to be conceived in speciall words, as to say, That the Duke of Northumberland was seised of five Messuages, and by such a one disseised, and after the Duke was attainted, and so granted, for the Queen may grant such a Right by reason of her Prerogative, and therefore the same ought to be granted by special words, as in the Case of Mynes in the Commentaries, and according to that was the opinion of the Justices in Cromers Case, 8 Eliz, which Case see, reported by Coke in the Case of the Marquesse of Winchester.

Trinit. 26. *Eliz.* in the Kings Bench.

XXVIII. Dayrell *and* Thinns *Caſe.*

Error. Edward Dayrell brought a Writ of Error againſt Sir John Thinns upon a Judgment had by the Defendant againſt the Plaintiffs Father of the Manor of Mexden: And Error was aſſigned for want of warrant of Attorney. And the Plaintiff prayed one Certiorare to the cheif Juſtice of the Common Pleas, and another Certiorare to the Cuſtos Brevium, both which returned, non inveni aliquod warr. and now Sir John Thinn being dead, the Plaintiff brought another Writ of Error by Journeys accounts againſt John Thynn Son and Heir of the ſaid Sir John Thinn, who appeared and alledged Diminution, in hoc, that the Warrant of Attorney is not certified, and prayed another Certiorare unto the cheif Juſtice of the Bench, and another to the Cuſtos Brevium, and it was argued by Clark, that in this Caſe Certiorare ought not be granted, for a Certificate is in the nature of a tryal, which ſhall not be croſſed in the ſame Action; but the parties to the Action, and their Heirs ſhall be bound by it, eſpecially when the matter is certified by one who is Judge of the Record, and that Certiorare ſued at the prayer of the Plaintiff ſhall be as peremptory, as if it had been ſued at the prayer of the Defendant, for the Plaintiff may alledge Diminution as well as the Defendant, 7 E 4. 25. by Yelverton. And a man cannot have Certiorare of a thing which is contrary to the Record, which is certified, 11 E 4. 10. by Laicon: So Diminution cannot be alledged in this Warrant of Attorney, becauſe it hath been certified here, that no Warrant of Attorney is to be found, &c. 9 E 4. 32. by Billiny; Egerton, Sollicitor contrary: For the Certiorare obtained at the ſute of the Plaintiff, ſhall not prevent the Defendant. And the courſe of proceeding in a Writ of Error, when Error is aſſigned out of the Record, and not of a thing within the Record, is ſuch: After Error aſſigned, before that a Sci. fac. iſſueth againſt the Defendant ad audiendum errores, the Plaintiff may pray a Certiorare to the Cuſtos Brevium, in whoſe hands ſuch collateral things remain, for the Plea Roll doth remain in the cuſtody of the cheif Juſtice, but the Original Writs, Eſſoines and Warrants of Attorney remain in the hands of the Cuſtos Brevium; and ſuch a Certiorare the Court may grant to the Plaintiff, without making the Defendant privy to it. And notwithſtanding that the Defendant hath pleaded, in nullo eſt erratum, and ſo hath affirmed the Record to be ſuch as is certified, yet the Court ex Officio, ſhall award a Certiorare to aſſertain themſelves if there be any ſuch Warrant of Attorney or not: which ſee 9 E 4. 32. by Billiny, and therefore the Certiorare. Certiorare being awarded, ex Officio, ſhall not prejudice the Defendant; and to this purpoſe he cited the Caſe betwixt the Lord Norris and Braybrook in a Writ of Error, where the Lord Norris being Plaintiff prayed a Certiorare to the Cuſtos Brevium, to certifie an Original Writ, upon which a common Recovery was had, and had it, and the Cuſtos Brevium certified, that there was no Original; and afterwards the Defendant prayed another Certiorare, and had it: and ſo in our Caſe here eſpecially, becauſe the Defendant was not party to the Record, nor hath day in Court, at the time that the ſaid Certiorare was granted, for the Defendant is not party before the Sci. facias ad audiendum errores be iſſued forth againſt him: and therefore he comes timely enough to pray a Certiorare. See 28 H 6. 10. and 11. And I grant that the Certificate upon a Certiorare which was awarded after a Sci. fac. ad audiendum errores is peremptory and final, but contrary where it is granted before the awarding of ſuch Scire facias: See Book Entries 271. The Plaintiff aſſigneth Error in the Original Writ, & pete br. Domini Regis Cuſtodibus Brevium, &c. ad breve illud origin. certificand. and upon the return of the Certiorare, the Plaintiff prayed a Scire facias ad audiendum errores. And ſee there 293. where it appeareth, fol. 272. that Certiorare

tiorare iſſued at the ſute of the Defendant in Erroꝛ after he had alledged Diminution: and that is after Scire facias ad audiendum errores returned; and ſee Certiorare beforꝛe Sci. facias awarded 271, &c. and this Certiorare is only ex officio, and awarded only to enforꝛm the Court: And in reſpect of the Certiorare the cheif Juſtice of the Common Pleas, to whom the Certiorare is directed, is but a Miniſter, and not a Judge. And as to the Caſe of 9 E 4. 32. beforꝛe citeꝺ, he could not haꝛe a Certiorare, foꝛ he could not alledge Diminution, becauſe he had pleaꝺed in Nullo eſt erratum, by which Plea he had confeſſed the Recoꝛd which is certified to be a full and perfect Recoꝛd, and fully certified, and againſt that matter he ſhall not alledge Diminution: And in our Caſe there is not any ſuch contrariety as hath been obiected, foꝛ the return of the certiorare is, Non inveni aliquod warrant. not preciſely, quod non habetur aliquod warrantum; And therefoꝛe if the Court now at the prayer of the Defendant grant another certiorare, upon which is a Reꝛoꝛn (quod habetur warr. Attornat.) the ſame is not contrary to the return of the firſt Certificate, but they both may ſtand togeꝛther, foꝛ upon further ſearch ſuch Warrant of Attoꝛney may be found: ſo upon the matter the Court ſhall not be enveigled by any ſuch contrariety, foꝛ (non inveni aliquod Warrant.) returned upon the firſt certiorare, and iuveni quoddam warr. upon the ſecond certiorare are not meer contrary; And it ſeemed to Wray cheif Juſtice, that it would be hard to grant a new certiorare in this Caſe, but if any variance could be alledged it ſhould be otherwiſe, as it was adjuꝺged in the Caſe of one Laſſell, who certified no Warrant of Attoꝛney, and afterwards it was moved foꝛ another certiorare, as it is here, and becauſe the Original was inter Johannem Laſſels ar. executoꝛ. Teſti. &c. where he was not named Executoꝛ in the firſt certiorare; upon that matter a new certiorare was granted.

Diminution.

Trin. 26. *Eliz.* in the Kings Bench.

XXIX. Withy *and* Saunders *Caſe.*

Withy libelled againſt Saunders in the Spiritual Court, and now came Saunders and ſurmiſed, that Withy had libelled againſt him foꝛ Tythgraſſe, and ſhewed, that all the claim that Withy had to the ſaid Tythes was by a grant made without deed, and by the Law ſuch things would not paſſe without deed; And alſo that the Spiritual Court would not allow of this Plea, and therefoꝛe prayed prohibition: And the Court upon the firſt Motion conceived a prohibition ſhould paſſe, foꝛ if the grant be without deed, nothing paſſed, and then hath not Withy cauſe to claim theſe Tythes againſt the ſaid Saunders. And notwithſtanding that Tythes are quodam modo ſpiritual things, and ſo demandable in a Court of that nature, yet now in diveꝛs reſpects they are become a Lay-fee, and lay things, foꝛ a Writ of Aſſize of Mortdaunceſter, and in Aſſize of novel diſſeiſin lyes of them, and a Fine may be levyed of them. But it hath been doubted, whether Tythes be deviſeable by Will: But at another day the matter was moved, and the Court was clear of opinion, that a conſultation ſhould be awarded, foꝛ whether Withy hath right oꝛ not right to theſe Tythes, Saunders of common right ought to pay his Tythes, and he ought to ſever them from the nine parts, and whoſoever takes them, whether he hath right to them oꝛ no right, Saunders is diſcharged: But Saunders may preſcribe in modo decimandi, without making mention of any ſeverance, and may ſurmiſe, that the Tythes do belong to I. S. with whom he hath compounded to pay ſuch a ſum foꝛ all Tythes, and afterwards a conſultation was awarded.

Tyths will not paſſe by grant without deed.

Trin.

Trin. 26. *Eliz.* in the Kings Bēnch.

XXX. Stacy *and* Carters *Case.*

STacy brought an Action of Trespasse for breaking his Close against Walter Carter, and declared of a Trespasse in Somers-Land in Tunbridge; The Defendant pleaded, that heretofore he himself brought an Assize of Novel disseisin against the now Plaintiff, and supposed himself to be disseised of his Free-hold in Lee juxta Tunbridge, and the Land where the Trespasse supposed to be done was put in view to the Recognitors of the said Assize, and further avered, that the Land where, &c. and the Land then put in view is one and the same, &c. upon which there was a Demurrer: Exception was taken to the forme of the Demurrer, because in the perclose and conclusion of the Demurrer these words are omitted, Et hoc paratus est verificare. But as to that, it was said by the Court, that the Demurrer was well enough, with or without such Averment in the conclusion of it, which see oftentimes in the Commentaries, &c. and in the book of Entries 146. the greater part of the Demurrers have not any such conclusion. Another Exception was taken to the barre, because the Defendant pleads, that heretofore Walter Carter had brought an Assize against the now Plaintiff, &c. and that the Land put in view to the Recognitors of the Assize per præfatum Warrhamum Carter, &c. and the Land where, &c. is all one, &c. here is Warrhamum for Walterium, and notwithstanding that, it was after demurrer, and not after verdict, it was adjudged amendable, and as to the matter of the barre, it was said by the Defendants Counsell, that recovery of Lands in one Town, by precipe quod reddat, is not a barre for Lands in another Town, but where the recovery is by Assize it is otherwise, for there the Plaint is general Se lib. tento, and the Plaintiff shall recover per visum Juratorum, and the view is the warrant of the Judgment and Execution. And therefore if a recovery in an Assize be pleaded in barre, not comprised, is not any Plea against it, as in the Case of recoveries upon a Precipe quod reddat; but not put in view, and so not comprised, &c. which proves that the Record doth not guide the recovery, but the view of the Jurors. See 26 E 3. 2. Assize brought of Lands in D, the Tenant saith, that he holdeth the said Lands put in view joyntly with A, not named in the Writ, &c. and sheweth the deed of the Joynt-tenancy, which speaks of Tenements in B, & the plea holdeth good, because he alledgeth the Joynt-tenancy and the Lands put in view: See act. 24 E 3. It was said on the Plaintiffs side, that recovery of Land in Lee juxta Tunbridge could not extend to Lands in Tunbridge, no more then a recovery of Lands in one County can extend to Lands in another County: See 23 E 3. 16. Assize of Novel disseisin brought of Lands in N, the Defendant pleads recovery in Assize, &c. brought before by him against the now Plaintiff of Lands in H, and the same Lands put then and now in view, and adjudged no barre. See also 16 E 3. 16. in an Assize of Tenements in W, the Tenant pleads a Recovery of the same Lands against one A by Assize brought of Tenements in C, which was found by the Assize, & that C is a Hamlet of W, and the Plaintiff notwithstanding that recovery so pleaded had Judgment, for a recovery of Lands in one Town shall not be a barre in an Assize of Lands in another Town. See Br. to Judgement, 66 10 E 3. And the whole Court was clear of opinion, that the plea in barre was not good, for in the Assize which is pleaded in barre in the principal Case, the Tenant there, who is now Plaintiff in this Action of Trespasse, pleaded Nul tort nec disseisin, which plea, as to the Free-hold in Lee juxta Tunbridge, and therefore it cannot be like to the Case which hath been put off, 26 E 3. for there the Tenant pleaded, that he held the said Lands put in view joyntly, for there he agreeth with the Plaintiff in the Lands demanded, the which Lands are put in view;

Averment.

Barre.

view; but if in the Case at barre the Defendant being Plaintiff in the Assize, the now Plaintiff being then Tenant, had pleaded to the Land put in view in barre, and the Plaintiff in the Assize had recovered, now in this Action of Trespasse the Plaintiff in the Assize being Defendant in the Action of Trespasse, might well plead this Recovery in barre, for by his plea in the Assize he hath tyed himself to the view, and to the Land put in view, but it is not so in the Case at Barre, where the Tenant in the Assize pleads, nul tort, nul disseisin, for there he doth not plead expresly to the Land put in view, but to the supposal of the Plaintiff sc. de libero tenemento in Lee juxta Tunbridge: afterwards Wray, with the assent of the other Justices awarded, that the Plaintiff should recover his damages: See by Wray, 44 E 3. 45. in Assize of Tenements in B, the Plaintiff pleads, that he himself brought an Assize of the same Tenements, and his plaint was of Tenements in E, and the same Tenements put in view, and recovered, and holden a good Plea, because the Tenant hath said, that the same Tenements were put in view, and that took by Assize, upon which the Plaintiff said, not put in view, and so compelled.

Trin. 25. *Eliz.* in the Kings Bench.

XXXI. Benicombe *and* Parkers *Case.*

IN an Action of Trespasse the Jury found this special matter, that the Grandfather of the Plaintiff was seised, and made a Feoffment to the use of himself for life, the remainder to the use of John Father of the Plaintiff in tayl, the Grand-father dyed, the Father entred, and by Indenture by words of bargain and sale, without any words of Dedi & concessi, conveyed the Lands to the use of A in Fee, and in the same Indenture was a Letter of Atorney to make Livery, which was made accordingly; and the said A by the said Indenture covenanted, that if the said John should pay before such a day to the said A forty shillings, that then the said A and his Heirs would stand seised, &c. to the use of the said John and his Heires; and if the said John did not pay, &c. then if the said A did not pay to the said John within four dayes after ten pounds, that then the said A and his Heirs from thenceforth shall be seised to the use of the said John and his Heirs, &c. and the said John covenanted further, by the said Indenture, to make such further assurance as the Counsil of the said John should advise. Each party failed of payment. John levyed a Fine to A without any consideration; it was adjudged upon this matter a good Feoffment well executed by the Livery, notwithstanding that the words of the conveyance are only by bargain and sale; and that the Covenant to be seised to the new uses upon payment, and not payment being in one and the same deed, should raise the use upon the contingency, according to the limitation of it; and Judgement was given for the Plaintiff accordingly. Feoffments.

Trin. 25. *Eliz.* in the Kings Bench.

XXXII. Bedowes *Case.*

IN an Action of Debt upon a Bill sealed against one Bedow; he demanded Dyer of the Bill, which was, Memorandum that I John Bedow have agreed to pay to R. S the Plaintiff twenty pounds, and thereupon there was a Demurrer, first, that the deed wanted the words, In cujus rei testimonium, &c. but notwithstanding that the Court held the deed good, and said so it was lately Debt.

adjudged: Another matter was becauſe the words of the contract are in the preter tence, I have agreed, but notwithſtanding that exception the Plaintiff had Judgement to recover, as by Wray, theſe words, dedi & conceſſi, according to the Grammaticall ſence imply a guift precedent, but yet they are uſed as words of a preſent conveyance, and Judgement was given for the Plaintiff.

Paſch. 27. *Eliz.* In the Common Pleas.

XXXIII. *Marſhe* and *Smiths* Caſe.

GEorge Marſh brought a Replevin againſt Smith and Paget, who make Conuſans as Baylies to Ralph Bard, and upon the pleading, the Caſe was, That Sir Francis Askew, was ſeiſed of the Manno^r of Caſford in his Demeſne, as of Fee, which Manno^r, did extend unto Daſton, North-kelſey, South-kelſey D and C, and had demeſnes and ſervices, parcell of the ſaid Manno^r, in each of the ſaid Townes, and ſo ſeiſed, granted, totum manerium ſuum de North-kelſay in Northkelſay, to the ſaid Bard and his Heires, and granted further, all his Lands, Tenements, and Hereditaments, in North-kelſey, and to that grant, the Tenants in North-kelſey did attorne; And the Land in which the ſaid Diſtreſſe was taken is in North-kelſey; the only queſtion in the caſe was, if, by this grant to Ralph Bard, a Manno^r paſſed, or not: And the caſe was argued by the Juſtices; And Periam Juſtice argued, That upon this grant no Manno^r paſſed, for before the grant, there was no Manno^r of North-kelſey, or in North-kelſey, therefore no Manno^r can paſſe, but the Lands and ſervices in North-kelſey ſhall paſſe as in groſſe, for they were not known by a Manno^r, but for parcell of a Manno^r: And a Manno^r is a thing which cannot be ſo eaſily created, for it is an Hereditament which doth conſiſt of many reall things, and incorporated together before time of memory; common reputation cannot be intended of an opinion conceived within three or four years, but of long time; And appendancy cannot be made preſently, but by a long tract of time: As an Advowſon in groſſe cannot be made by an Act appendant, and the Queen her ſelfe by her Letters Patents cannot make a Manno^r at this day, a multo fortiori, a ſubject cannot; and the Queen cannot by her Letters Patents without an Act of Parliament anner a Manno^r to the Dutchy of Lancaſter, which ſee 1. Ma. Dyer 95. And where it is uſuall, that the Queen doth grant Lands, tenendum de manerio ſuo de Eaſt Greenwich in communi ſoccagio, if upon the death of ſuch a Grantee without heire, the ſaid Land doth revert unto the Queen in point of Eſcheat, the ſaid Land ſhall not be parcell of the ſaid Manno^r, for the demur was not parcell of the Manno^r in truth, but in reputation: And he cited a caſe, that the Lord Sturton was ſeiſed of the Manno^r of Quincamore, and was alſo ſeiſed of the Manno^r of Charleton which was holden of the ſaid Manno^r of Quincamore; The Lord Sturton was attainted of Felony; and afterwards Queen Mary gave the ſaid Manno^r of Quincamore to Sir Walter Mildmay cum ſuis omnibus juribus & parcellis, it was adjudged that the Manno^r of Charlton did paſſe, for it is now become parcell of the Manno^r of Quincamore, and I grant, that things which goe with the Land ſhall paſſe well enough: As if the Queen grant to three Coparceners of three Manno^rs, the liberty of Warden in all the ſaid three Manno^rs, they afterwards make partition ſo as each Coparcener hath a Manno^r, and the one of them grants her Manno^r, the Grantee ſhall have Warrant: But if the Queen grant a Leet (ut ſupra) and the Coparceners make Partition, and each of them hath a Manno^r, ſhee ſhall not have alſo a Leet, but the Leet which was granted doth remain in common, and there ſhall not be there, upon ſuch partition, ſeverall Leets: And alſo I grant that in the caſe of two Coparceners of a Manno^r, if to each of them upon partition be allotted

Grants. Mannor.

Mannor, what it is.

Reputation.

Grants of the King.

lotted demeanes and services, each of them hath a Mannor, for they were compellable to make partition by the common Law being in by descent, See 26. H. 8. 4. 9 E. 4. 5. contrary of Joynt-tenants, for they are in by purchase, and were not compellable by the common Law to make partition, & therefore upon partition betwixt them a Rent cannot be reserved for the equality of the partition: And in every Mannor a Court is requisite for a Court Baron is incident to a Mannor, but a Court cannot at this day be founded or erected, but it ought to be of long time: And in our Case, no Court hath ever been holden in North-kelsey: And if I be seised of the Mannor of B which extends into C and B, and I grant my Mannor of B in D, now a Mannor passeth, and doth extend into D, and the residue which is in C shall remaine in mee in grosse, v. 9. E. 4. 17. Catesby; And if I be seised of a Mannor which doth consist of services, and of twenty Free-holders, and one hundred Acres of Demesnes, and I grant the services of my twenty Free-holders, & forty or twenty Acres of the said one hundred Acres, a Mannor shall passe, although it was not granted by the name of a Mannor; but if I grant the services of three, four, or five of my Free-holders, and forty or twenty of the said one hundred Acres, upon such a grant no Mannor shall passe: Windham Justice contrary, Wee are not here to speak of the creation of a Mannor, that is a forrain matter, but we are here to consider upon the division, and apportionment of a Mannor, they that have argued in this case at the Bar, have stood much upon the words of the Conveyance, manerium suum de North-kelsey, and that Sir Fr. Askew at the time of that assurance, had not any Mannor of North-kelsey, or in North kelsey, but that is not any reason, for if Cestuy que use (meane betweene the Statute of 1 A. 3. & 27 H. 8.) will make a Feoffment of the Mannor which was in use, by these words, manerium suum, the same had been good, and yet it is not manerium suum,, but the Mannor of the Feoffees, but it may be said suum, by procenamy of the profits according to the trust and confidence reposed in the Feoffees; so in our case, in as much as Sir Fr. Askew had before this grant aswell demesnes as services in North-kelsey, it may collaterally be said a Mannor there, and notwithstanding that tempore concessionis (proprie loquendo) no Mannor was in North-kelsey, yet now upon operation of the Law, upon this grant a new Mannor shall rise; for in diverse cases where a thing which was not in esse before, upon a grant, may rise: As if I grant unto you out of my Land a Rent de novo; And also a thing which was not in esse before, may upon a grant take upon it a new nature; as if I, seised of a great Wood, grant to you Estovers out of it, they were not before in me but as Woods and Trees, now by this grant they are become Estovers in the Grantee, so as they are in the Grantee in another nature, then they were in mee: So in our case, although North-kelsey was not a Mannor in Sir Francis Askew, yet now upon the grant it is a Mannor in Bard, 9 E. 4. 17. And as to the matter which hath been objected, because a Court cannot now begin, the same is not any reason, for the Court Baron is incident to the Mannor, and also to every part of the Mannor, and transitory through the whole Mannor, and if Sir Francis Askew had sold all the demesnes of the Mannor in Castord, where the Court Baron for the said Mannor had alwayes been held and not elsewhere, yet such a Court might be holden in any part of the Demeanes in any other of the said Townes: The Lord Anderson, to the same purpose, it hath been argued of the other side, that the Mannor doth not passe, because the grant is in these words, manerium de North-kelsey, in North-kelsey, I conceive that these words (de North-kelsey) are void, as matter of surplusage, and the grant shall be construed as if the words had been manerium suum in North-kelsey: And a Mannor is such a thing, as may be determined, divided, and suspended: As if the Lord of a Mannor leaseth for years all the Demeanes of the Mannor, the Mannor is suspended during the terme for

Court Baron.

years, as lately it hath been adjudged. And a warranty may be divided, as if a Feoffment in Fee be made to two with warranty, and the one of them releaseth the warranty: vide L 5. E 4. 103. A seised of a Mannor which extendeth in four Towns, B, C, D, and E, and he gives his Mannor in B, C and D by this gift the Mannor and all that is in the said four Towns passeth. And he cited also a Case 21 E 4. 3. The Lord of a Mannor erected a Chappel within his said Mannor as a Chappel of Ease, &c. and afterwards it is a Parish-Church, now it is become presentable; an Advowson appendant, as the soil upon the which the Church is built is parcel of the Mannor. See 32 H 6, 9. One Mannor may be parcel of another Mannor, as A holdeth of B twenty acres of Land, as of his Mannor of C, which Mannor B holdeth of D, as of his Mannor of E, B dyeth without Heir, so as his Mannor of C is escheated unto D; now the twenty acres are holden of the Mannor of C as they were before, and the Mannor of C is by the Escheat become parcel of the Mannor of E: And by Lease of the Mannor of E it shall passe, and I do not know any difference now between the Case of Parceners, and the Case of Joynt-tenants, for now they are both equally compellable to make partition: And he cited the Case of one Bishopp. lately adjudged, viz. the Queen was seised of the Rectory of D, which extended into the Counties of Lincoln and York, and the Queen granted her Rectory of D in Lincoln, these are several grants, and now upon the matter they are become several Rectories. And as to that which hath been objected concerning a Court Baron which ought to belong to this new Mannor, and that such a Court cannot now at this day be erected, and therefore here cannot be a Mannor; here needs not the erection of any new Court but forasmuch as the Court Baron before this grant might be by Law holden in any place within the Mannor: therefore every part of the Demeans of the Mannor is capable of a Court to be holden there. As where one is seised of a Mannor to which an Advowson is appendant; now is the Advowson appendant not only to the said Mannor but to every part of it, for if he alien an acre, parcel of the Mannor with the Advowson, the Advowson is now appendant to the said acre: See 43 E 3. 26. So in the Case at Barre, because this liberty and franchise of a Mannor is throughout the whole Mannor, and in every part of the Services and Demesnes upon this grant of the Services and Demesnes in North-kelsey, and of his Mannor in North-kelsey, a Mannor passeth; which Windham also granted and agreed unto. Note, at this time there were but three Judges in this Court: And afterwards Judgment was given for the Defendant.

Pasch. 27 *Eliz.* in the Kings Bench, rot. 584.

XXXIV. Alington *and* Bales *Case.*

ALington and others, Executors of Sir W Cordel late Master of the Rols, brought an Action of Debt against Bales: the Case was this, one Breame being seised of certain Lands, by Indenture, bargained and sold the same to one Platte by these words (give, grant, bargain, sell) and by the said Indenture covenanted with Platte, that the said Platte and his Heires should quietly enjoy the said Lands without interruption of any person or persons: And afterwards certain controversies rising betwixt them concerning the said Lands, the said Beame and Platte submitted themselves to the award and arbitrament of Sir W Cordel, to whom they were bounden severally for the performance of such award, the which Sir W amongst other things awarded, that the said Platte and his Heires should enjoy quietly the said Lands, in tam amplo modo & forma, as the said Land is conveyed and assured by the conveyance and assurance aforesaid: And the truth was, that the said Breame at the time

Arbitrament.

of

of the said Assurance was bounden in a Recognizance of six hundred pounds to one More, 1 15. Eliz. and afterwards More 16 Eliz. sued a Sci. fac. upon the said Recognizance; and 18 Eliz. the bargain and sale aforesaid was made; and afterwards 19 Eliz. More sued forth Execution by Elegit, and the moyety of the said Land assured to Platte was delivered in Execution to More. And if upon the whole matter the Arbitrament was broken was the question, it was argued by Godfrey, that the Plaintiff ought to be barred, and first, he conceived that these words in the Indenture (give and grant) did not help the Action, for the Lands passed with a charge, and the general words Dedi & concessi, do not extend to this collateral charge, but to the direct right of the Land only, but if a stranger had put out the bargain there, upon such general words, an Action would lie, but as the Case is, they do not give any cause of Action, for the Recognizance was a thing in charge at the time of the Assurance: and yet see 31 E 3. Br. Warr. Charta, 33. A enfeoffeth B with warranty, who brings a Warrant in Charta and recovers pro loco & tempore, and afterwards a stranger doth recover against him a Rent charge out of the said Land, and it was holden, that upon the matter B should have execution: the special words of the Arbitrament, upon which the Action is brought, are, that the said Platte and his Heirs should enjoy the said Lands in tam ampl. modo & forma, as it was assured and conveyed to the said Platte; ergo, not in more ample manner: and the the said Land was conveyed to Platte, chargeable to the said Recognizance, therefore if Platte enjoy it charged, there is no cause of Action: And as to the Covenant in the Indenture, that Platte and his Heirs should enjoy quietly the said Lands without interruption of any person, the same is a Collateral surety; and the words of the Award are, that Platte shall enjoy it in tam ampl. modo & forma, as it is conveyed and assured by the assurance aforesaid without interruption, these are not words of assurance, for the assurance doth consist in the legal words of passing the estate: scil. bargain sale, Dedi concessi, and in the limitation of the estate, and not in the words of the Covenant; And therefore it hath been adjudged, that if I be bounden to A in an Obligation, to assure to him the Manor of D, &c. if A tender to me an Indenture of bargain and sale, in which are many Covenants, I am not bound upon the peril of my Bond to seal and deliver it. Also here doth not appear any interruption against the Covenant in the Indenture, for here is not any lawful Execution, for it appeareth here, that More hath sued Execution by Elegit. 4. yeares after the Judgment in the Scire facias, in which case he shall be put to a new Scire facias, for the Sheriff in this Case ought to have returned, that the Conusor after the Recognizance had enfeoffed divers persons, and shewed who, and upon that matter returned, the Conusee should have a Sci. facias against the Feoffees, vide F. N. B. 266. And the Court was clear of opinion against the Plaintiff.

Trin. 27. *Eliz.* in the Kings Bench.

XXXV. Floud *and Sir* John Perrotts *Case.*

FLoud recovered against Sir John Perrott, in an Action upon the Case upon a promise, eighty six pounds, against which Floud one Barlow affirmed a Plaint of Debt in London, and attached the said money in the hands of the said Sir John, and had execution according to the custom of London. And now the said Floud sued a Scire facias against the said Sir John, who appeared, and pleaded the said Execution by attachment; upon which Floud the Plaintiff did demurre in Law: And it was adjudged no plea, for a duty which accrueth by matter of Record cannot be attached by the custom of London. And notwithstanding that the custom of London be layed generally in aliquo debito, and damages recovered are quoddam debitum, as it was urged by the Counsel

Judgements in the Kings Courts not to be defeated by particular customs of places.

cil of the Defendant: Yet the Law is clear, that Judgemnts given in the Courts of the King ought not, nor cannot by such particular customs be defeated & avoided, as it was lately adjudged in a Western Case, damages were recovered, the Sheriff by virtue of a Fieri facias levyed the money, which one to whom the Plaintiff was endebted, did attach by the custom, in the hands of the Sheriff; but it was adjudged the attachment was not good, for the custom of attachment cannot reach upon a thing of so high a nature as a Record is; the same Law of Debt upon a Recognizance and Statute, &c. and it was affirmed by Wray cheif Justice, that upon great deliberation it was agreed, by Bromley Lord Chancellor himself, the Lord Anderson, Mead and Periam Justices, that where a Merchant, having in an Action recovered certain damages, became Bankrupt, upon which issued a Commission upon the Statute of 13. Eliz. of Bankrupts, that such Commissioners could not entermeddle with such damages, to dispose of them to the Creditors, according to the said Statute: But now see the Statute of 1 Jacobi. The Commissioners have power to dispose of such debts, &c.

Trinit. 27. *Eliz.* in the Kings Bench.

XXXVI. *sir* Walter Hungerfords *Case.*

Grants of the King.

IN a Replevin by Sir Walter Hungerford, the Case was this, the Queen being seised of a great Waste called Ruddesdown in the Parish of Chipnam, granted to the Mayor and Burgesses of Chipnam, the moyety of a Yard-land in the said Waste, without certainty in what part of the Waste they should have the same, or the special name of the Land, or how it was bounded, and without any certain description of it. And afterwards the Queen granted to the said Sir Walter the said Waste, and afterwards the said Mayor and Burgesses by warrant of Attorney under the Common Seal, authorized one A to enter in the said Waste, and in the behalf of the said Mayor and Burgesses

Election.

to make election of the said moyety, &c. who did so accordingly. And upon this matter given in evidence the parties did demurre in Law, and the Jury were discharged. And it was holden and resolved by the whole Court, that the grant to the Mayor, &c. was utterly void for the incertainty of the thing granted: And if a common person do make such a grant it is good enough, and there the Grantee may make his choice where, &c. and by such choice executed, the thing shall be reduced into certainty: which choice the Grantee cannot have against the Queen, which difference was agreed by the whole Court: And it was further holden, that this grant was not only void against the Queen her self, but also against Sir Walter Hungerford her Patentee. It was further holden by the Court, that if a common person had made such a grant, which ought to be reduced to certainty by Election, and the Corporation to whom the grant was made (ut supra) should not make their election by Attorney, but after that they were resolved upon the Land, they should make a special warrant of Attorney, reciting the grant to them, and in which part of the said Waste their grant should take effect, East, West, &c. or by buttals, &c. according to which direction the Attorney is to enter, &c.

Trinit. 27. *Eliz.* in the Common Pleas.

XXXVII. Watts *and* Jordens *Case.*

IN Debt by Watts against Jorden, processe continued until the Defendant was Out-lawed, and upon the Capias ut lagatum he appeared and pleaded to issue,

issue, which was found for the Plaintiff, and Judgement given accordingly. Error.
And now came Jourden and cast in a Writ of Error, and assigned for Error, that he appeared upon the Capias ut lagatum, and pleaded to issue, the Original being determined, and not revived by Scire facias, upon his Charter of pardon; Anderson Justice was of opinion, that it was not Error, for that the Statute of 18 Eliz. had dispensed with it, being after verdict, for the words of the Statute are, For want of any Writ Original or Judicial: Windham Justice contrary, for the Statute doth not extend, but where the Original is imbesselled, but in this Case it is not imbesselled, but in Law determined, and at last the Writ of Error was allowed.

XXXVIII. *Trinit.* 23. *Eliz.* in the Common Pleas.

The Case was, A seised of Lands by his Will devised, that his Executors should sell his Lands, and dyed, the Executors levy a Fine thereof to one F, taking money for the same of F. If in title made by the Conusee to the Land by the Fine, It be a good plea against the Fine to say, Quod partes ad finem nihil habuerunt, was the question. Anderson conceived that it was: But by Windham and Periam upon Not-guilty; The Conusee might help himself by giving the special matter in evidence, in which Case the Conusee shall be adjudged in; not by the Fine, but by the Devise: As by Windham. Fines levyed.
A deviseth, that his Executors shall sell a Reversion of certain Lands, of which he dyeth seised; they sell the same without deed, and good; for the Vendee is in by the Devise and not by the conveyance of the Executors: See 19 H 6. 23. Devise.
And by Periam the Conusee may help himself by pleading, as he who is in by the Feoffment or grant of Cestuy que use by the Statute of 1 R 3.

Trin. 27. *Eliz.* in the Common Pleas.

XXXIX. Albany *and the Bishop of St.* Assaphs *Case.*

Albany brought a Quare impedit against the Bishop of St. Assaph, who justified for Lapse: The Plaintiff by Replication said, that before the six moneths expired, he presented to the said Bishop one Bagshaw, a Master of Arts and Preacher allowed, &c. The Defendant by way of Rejoynder said, that the Church upon the presentment to which the Action is brought is a Church with Cure of Soules, and that the Parishioners there are homines Wallici, Wallicam loquentes linguam & non aliam. And that the said Bagshaw could not speak or understand the Welch Language, for which cause he refused him, and gave notice to the Plaintiff of such refusal, and of the cause of it, &c. upon which the Plaintiff did demurre in Law. And first it was agreed and resolved by the whole Court, that in the computation of the six moneths in such Cases, the Reckoning ought not to be according to the Kalender, January, February, &c. but Secundum numerum singulorum dierum, allowing eight and twenty dayes to every moneth: Walmesley Serjeant argued for the Plaintiff, and he took exception to the Rejoynder; for in that the Defendant had departed from his Barre, for in the Barre the Defendant intitles himself to the presentment by reason of Lapse, and in the Rejoynder he confesseth the presentment of the Plaintiff, and pleads his refusal of his Clarke, and shews the cause of it; sc. the want of the Welsh Language, which is a Departure: And he cited divers Cases to the same purpose, 27 H 8. 3. In forfeiture of Marriage, the Defendant pleaded the Feoffment of the Ancestor of the Heir to divers persons, absq; hoc, that he dyed in the homage of the Plaintiff, the Plaintiff by Replication said, that the said Feoffment was made to the use of the said Ancestor and his Heires, the Defendant by Rejoynder saith; that Quare impedit. Departure;

the

the said Ancestor did declare his Will of the said Lands, the same was holden a Departure, for he might have pleaded the same in Barre, and 21 H 7. 17, 18. and 37 H 6. 5. in Trespasse the Defendant pleaded, that I S was seised of the Land where, &c. being Land deviseable, and devised the same to him and his Heirs, the Plaintiff by Replication said, that I S at the time of the devise was within age, &c. The Defendant by Rejoynder said, that the custom there is, that every one of the age of fifteen years might devise his Lands, &c. the same was holden a departure: But to this Exception the Court took not much regard: But as to the matter in Law, it was argued by Walmesley, that the defect of the Welsh Language assigned by the Defendant in the presence of the Plaintiff is not a sufficient Cause of refusal; for notwithstanding that it be convenient that such a Presentee have the knowledge of such Language, yet by the Law of the Land, ignorance of such Language, where the party hath more excellent Languages, is not any disability; and therefore we see, that many Bishops in Wales, who have the principal Cure of Soules, are English-men; and the Welsh Language may easily be learned in a short time by converse with Welsh-men: And the Statute of 1 Eliz which establisheth the Book of Common Prayer, ordaineth, that the said Book of Common Prayer shall be put in use in all the Parish Churches of Eng. and Wa. without any provision there for the translation of the said Book into the Welsh Language. But afterwards by a private Act it was done, by which it is enacted, That the Bishop of Wales should procure the Epistles and Gospels to be translated, and read in the Welsh Language, which matter our Presentee might do by a Curate well enough: And he conceived, that by divers Statutes, Aliens by the Common Law were capable of Benefices. See the Statute of 7 H 2. Cap. 12. 1 H 5. Cap. 7. 14 H 6. Cap. 6. and before the said last Statute Irish-men were capable of Benefices. Gawdy Serjeant contrary: and he confessed, that at the Common Law the defects aforesaid were not any causes of refusal; but now by reason of a private Act made, 5 Eliz. Entituled, An Act made for the translating of the Bible, and of the Divine Service into the Welsh tongue, the same defect is become a good cause of refusal; in which Act the mischeif is recited, viz. That the Inhabitants of Wales did not understand the Language of England, therefore it was Enacted, That the Bishops of Wales should procure so many of the Bibles and Books of Common Prayes to be imprinted in the Welsh Language, as there are Parishes and Cathedral Churches in Wales, and so upon this Statute, this imperfection is become a good cause of refusal. And he likened it to the Case of Coparceners and Joynt-tenants, who now, because that by the Statute of 32 H 8. Joynt-tenants are equally capable to make partition as Coparceners were by the Common Law; Now Partition betwixt Joynt-tenants within age is as strong as betwixt Parceners within age. But as to that payment it was said by the Lord Anderson, that it is very true, that upon the said Statute the want of the Welsh Language in the Presentee is now become a good cause of refusal, but because the said Act being a private Act hath not been pleaded by the Defendant, we ought not to give our Judgment according to that Act, but according to the Common Law. Another matter was moved, because here appeareth no sufficient notice given to the Patron after the said Refusal, for the Plaintiff did present the thirteenth of August (the Church voyding the fourteenth of March before) the nine and twentieth of August the six months expired; the fourth of September the Defendant gave notice to the Patron of the refusal, and the fourteenth of September was the Collation, and it was said by the Lord Anderson, that it appeareth here, that there are two and twenty dayes between the Presentment and the Notice, which is too large a delay: And the Defendant hath not shewed in his Plea any cause for the justifying or excuse of it, and therefore upon his own shewing we adjudge him to be a disturber: See 14 H 7. 22. 15 H 76. and note by Periam, it was adjudged

judged in the Case of Mollineux, if the Patron present, and the Ordinary both refuse, he ought to give notice to the person of the Patron thereof, if he be resident within the County, and if not, at the Church it self which is void.

XL. *Mich.* 27. and 28. *Eliz.* at Serjeants Inne.

THis Case was referred by the Lords of Councel to the Justices for their opinions, I S by Indenture between the Queen of the one part, and himself of the other part, reciting that where he is indebted to the Queen in eight hundred pounds, to be paid in form following, twenty pounds at every Feast of St. Michael, until the whole sum aforesaid be paid, covenanted and granted with the said Queen, to convey unto the Lord Treasurer, and Barons of the Exchequer, and to their Heirs, certain Lands to the uses following, viz. to the use of the said I S and his Heirs, until such time as the said I S, his Heirs, Executors or Administrators shall make default in payment of any of the said sums; and after such default, to the use of the said Queen, her Heirs and Successors, until her Heirs and Successors shall have received of the issues and profits thereof such sums of money parcel of the said debt as shall be then behind unpaid, and after the said debt so paid and received, then to the use of the said I S and his Heirs for ever. I S levyeth a Fine of the said Land to the said Lord Treasurer & the Barons, to the uses aforesaid; & afterwards being seised accordingly, by deed indented and enrolled bargain & sels the said Land to a Stranger: default of payment is made, the Queen seizeth, and granteth it over to one and his Heirs, quousque the money be paid, and after the money is paid: And upon conference of the Judges amongst themselves at Serjeants Inne, they were of opinion, that now I S, against his Indenture of bargain and sale, should have his Lands again, for at the time of the bargain and sale he had an estate in Fee, determinable upon a default of parment, ut supra, which accrued to him by the first Indenture and the Fine, which estate only passed by the said Indenture of bargain and sale, and not the new estate which is accrued to him by the latter limitation after the debt paid, for that was not in esse at the time of the bargain and sale; but if the conveyance by bargain and sale had been by Feoffment or Fine, then it had been otherwise, for by such conveyance all uses and possibilities had been carried by reason of the forcible operation of it.

Hill. 28. *Eliz.* In the Kings Bench.

XLI. Taylor *and* Moores *Case.*

TAylor brought Debt upon an Obligation against Moore, who pleaded in barre, upon which the Plaintiff did demurre, and the Court awarded the Plea in Barre good, upon which Judgement the Plaintiff brought a Writ of Error, and assigned Error in this, that the Barre upon which he had demurred, as insufficient, was adjudged good: Upon which now in this Writ of Error the Barre was awarded insufficient, and therefore the Judgement reversed: But the Court was in a doubt what Judgment shall be given in the Case, viz. whether the Plaintiff shall recover his debt and damages, as if he had recovered in the first Action, or that he shall be restored to his Action only, &c. And Wray cited the Case in 8 E. 4. 8. and the Case of Attaint 18 E 4. 9. And at last it was awarded, that the Plaintiff should recover his debt and damages: See to that purpose 33 H 6. 31. H 7. 12, 20. 7. Eliz. Dyer, 235. Debt. Error.

Hill. 28. *Eliz.* in the Kings Bench.

XLII. Higham *and* Harewoods *Caſe.*

IN an Ejectione firmæ the Caſe was, that one Butty was ſeiſed of the Land where, &c. and alſo of a Meſſuage, with which Meſſuage the ſaid Land had been uſually occupied, fume out of mind, &c. and being ſeiſed lying ſick commanded a Scrivener to be brought to him, and the ſaid Scrivener being brought to him, he gave him Inſtructions to make his Will, and amongſt other things declared unto him, that his meaning was, that the ſaid Meſſuage, and all his Lands in Weſterfield ſhould be ſold by his Executors; and the Scrivener in making of the Will penned the matter in this manner: I will that my houſe, with all the appurtenances, ſhall be ſold by my Executors; Butty dyed, the Executors ſell forty acres of the ſaid Land to the Defendant; and all this matter was found by ſpecial verdict, and it was moved by the Plaintiffs Counſel, that the ſale of this Land by the Executors is not warranted by the Will: Another matter was moved, ſcil. admitting that the Executors have authority by the Will to ſell the Land, if the ſale of parcel of the Land be good and warrantable: As if I make a Charter of Feoffment of ten acres, and a Letter of Attorney to make livery of them to the Feoffee, if the Attorney makes ſeveral liveries of the ſeveral acres the ſame is void: But by Cook the Caſes are not like, for in the Caſe put he hath a ſpecial Commiſſion, in which the party to whom, and all the other circumſtances are ſet down certainly, contrary in the Caſe at the Barre, there the Commiſſion is general &c. and peradventure the Executors ſhall never find a Chapman who will contract with them for the whole. And afterwards upon conference amongſt the Judges, Clench, Gawdy and Wray, it was reſolved, that by this deviſe the Land do paſſe by the ſale of the Executors to the Defendant, which ſale alſo by proceſſe is warranted by the Will, for by Wray, theſe words, with all the appurtenances are effectual and emphatical words to enforce the deviſe, and that doth extend to all the Lands eſpecially, becauſe it is found, that the Teſtator gave to the Scrivener his Inſtructions accordingly: And afterwards Judgement was given againſt the Plaintiff. See 3 Eliz. Plowd. 210. Betwixt Sanders and Freeman, there the Deviſe is pleaded in this manner. Meſſuagiam cum pertinentiis ad illud ſpectantibus in perpetuum in villa de Arthingworth.

Trinit. 28. *Eliz.* in the Kings Bench.

XLIII. Watkins *and* Aſtwicks *Caſe.*

IN an Ejectione firmæ, it was found by ſpecial verdict, that one Maynard was ſeiſed, and made a Feoffment in Fee upon condition of payment of money on the part of the Feoffor by way of Mortgage at a certain day, before which day the ſaid Maynard dyed, his Son and Heir being within age, afterwards at the day of payment limitted by the Mortgage, a ſtranger at the inſtance and requeſt of the Mother of the Heir tendred the money to the Mortgagee in the name of the Heir being within age, who refuſed it. And it was reſolved by the whole Court, that the ſame is not a ſufficient tender to redeem the Land, according to the Mortgagee, for it is found by the Jury, that the Heir at the time of the tender was within age, generally, not particularly of ſix or ten yeares, &c. then it might well ſtand with the verdict, that the Heir at ſuch time was of the age of eighteen or nineteen yeares, at which age he is by the Law out of the Ward of his Mother, or any other prochin amy, in which

Tender to redeem a Mortgage.

Caſe

Case it is presumed in Law, that he hath discretion to govern his own affairs: and in this Case the Mother is but a stranger, for the Law hath estranged the Mother from the government of the Heir; but if the Jury had found that the Heir at the time of the tender was of tender age, viz. within the age of fourteen yeares, in which Case by Law he ought to be in Ward, in such Case the tender had been good.

Trin. 28. *Eliz.* in the Kings Bench.

XLIV. Lepur *and* Wroths *Case.*

A Replevin by Lepur against Wroth, and declared upon a tortious taking in Burnham in the County of Essex, the Case upon the pleading was, that Robert Earl of Sussex was seised of the Mannor of Burnham in Fee, and leased the same to the King for one and twenty yeares, and afterwards the said Earl dyed, by which the said Mannor descended to Thomas late Earl of Sussex, and he being seised: 4 and 5 Phil. and Mary it was Enacted by Parliament, That the Lady Frances, Wife of the said Earl, by virtue of the said Act of Parliament should have, hold and enjoy, &c. during the widowhood of the said Frances, for and in consideration of the Joynture of the said Frances the said Mannor: Provided alwayes, and it is further enacted, That it should be lawful for the said Earl, by his writing indented, dimessionem vel dimessiones facere pro termino 21. annorum vel infra de eodem Manerio pro aliquo redditu annuali, it quod super omnes & singulos hujusmodi dimessionem & dimessiones antiquus redditus & consuetus vel eo major & amplior reservaretur, and that every such demise should be of force, and effectual in Law against the said Frances for term of her life, if the said term should so long continue: And further the said Act gave to the said Frances, Distresse, Avowry, Covenant, &c. against such Lessee, and for the said Lessee against the said Dame; And afterwards the said Thomas, the said former Lease not expired, leased the said Mannor to Wroth the Defendant for one and twenty years, to begin at the Feast of Saint Michael next following (and note the Lease was made the third of April before) rendring three hundred and forty pounds per annum, which was redditus amplior antiquo & usuali. Popham Attorney general argued, that the said Lease did not bind the said Lady Frances, and that for two Causes: 1. because it is to begin at a day to come: 2. because it was made, a former Lease being in esse, and he argued much upon construction of Statutes to be made not according to the letter, but according to the meaning of them: And he cited a Case upon the Statute of 2 H 5. 3. by which it is Enacted, that in no Action in which the damages do amount to forty marks, any person should be admitted to passe in tryall of it, who had not Lands or Tenements of the cleare yearly value of forty shillings, yet the said Statute shall not be by construction extended, where in an Action between an English-man and an Alien, the Alien prayeth medietatem linguæ; and yet the Statute is general: So in our Case, although this private Act doth not seem to provide expressly but for two things: 1. the number of the years, 21, & non ultra: 2. antiquus redditus vel eo amplior, yet in reason and good understanding we ought to think, that the intent of the Act was, that the said Mannor should now come to the said Lady Frances surcharged with Leases in Reversion, or to begin at a day to come, for if by this Act the said Earl might make a Lease to begin three moneths after, by the same reason he might make a Lease to begin twenty years after, and also to begin after his death. It hath been objected, that the Lord Treasurer had a Commission to make Leases of the Queens Lands, and that by virtue thereof, he made Leases in Reversion: I know the contrary to that, for every such Lease is allowed by a Bill assigned, and not by the ordinary Commission afore-

Replevin.

Construction of Statutes.

Leases.

said, the words of our Act are, Demisiones facere pro termino 21. annorum, that shall be meant to begin presently: As if I lease to you my Lands for one and twenty yeares, it shall be intended to begin presently; and he cited the Case betwixt Foxe and Collier upon the Statute of 1 Eliz. concerning Leases made by Bishops: That four years of a former Lease being in being, the Bishop leased for one and twenty years, the same was a good lease, notwithstanding the former lease, for the lease began presently betwixt the parties. And it hath been adjudged, that a lease for yeares by a Bishop, to begin at a day to come, is utterly void. And he cited the Case of the late Marquesse of Northampton, who by such an Act of Parliament as ours was enabled to make leases of the Lands of his Wife for one and twenty yeares, and of the said Lands an ancient lease was made before the said Act, which was in esse, and before the expiration thereof, he made a lease by virtue of the said Act to commence after the expiration of the former lease, and that lease was allowed to be a good lease, warranted by the said Statute, because that the first lease, which was in esse, was not made by force of the said Act, but if the said former lease had been made by virtue of the said Statute, the second lease had been utterly void.

XLV. *Trin.* 28. *Eliz.* in the Kings Bench.

Copy-hold.

Surrender by Attorney not good.

A Copy-holder of the Manor of the Earl of Arrundel did surrender his customary Lands to the use of his last Will, and thereby devised the Lands to his youngest Son and his Heires and dyed, the youngest Son being in prison makes a Letter of Attorney to one to be admitted to the Land in the Lords Court in his room, and also after admittance to surreuder the same to the use of B and his Heirs, to whom he had sold it for the payment of his debts: And Wray was of opinion, that it was a good surrender by Attorney; but Gawdy and Clench contrary: and by Gawdy; If he who ought to surrender cannot come in Court to surrender in person, the Lord of the Manor may appoint a special Steward to go to the prison and take the surrender, &c. and by Clench; Lessee for years cannot surrender by Attorney, but he may make a deed perporting a surrender, and a letter of Attorney to another to deliver it.

Trin. 28. *Eliz.* in the Kings Bench.

XLVI. Troublefeild *and* Troublefeilds *Case.*

Entry.

THe Case was, that a Copy-holder did surrender to the use of his Will, and thereby devised the Land to his Wife for life, the remainder over to his son in tail, and dyed, the Wife entred, and dyed, a stranger did intrude upon the Lands, and thereof made three several Feoffments to three several persons, he in the Remainder entred upon one of the said three Feofees in the name of all the Lands so devised, and made a lease of the whole Land: And by Clench and Wray it was a good Entry for the whole, and by consequence, a good lease of the whole, Gawdy contrary: Note, all the Lands were in one County: See 16 Eliz. Dyer 337. 9 H 7. 25.

Trin.

Trin. 28. *Eliz.* in the Kings Bench.

XLVII. Parmort *and* Griffina's *Case.*

IN Debt upon an Obligation by Parmort against Griffina a Merchant-stranger, the Defendant pleaded, that the Obligation was made upon condition for the performance of certain Covenants contained within certain Indentures, and shewed what, &c. and alledged further, that in the said Indenture there is a proviso, that if aliqua lis, vel controversia oriatur impostorum, by reason of any clause, article, or other agreement in the said Indenture conteined, that then, before any sute thereupon attempted, the parties shall choose four indifferent persons for the ending thereof, which being done, the Indenture and Obligation shall be void: And in fact saith, that Lis & controversia, upon which the Action is brought, groweth upon the said Indenture, upon which there was a demurrer in Law. And because the Defendant hath not shewed specially upon what controversie or strife, and upon what article certain: The Court was clear of opinion, that the barre was not good: And also the Court was of opinion, that the said Proviso did not extend to subject and submit the breach of every Covenant or Article within the said Indenture to the Arbitrament of the said four persons, but only where strife and controversie doth arise upon the construction of any Covenant, &c. within the said Indenture; so as the Defendant ought to have shewed such matter which fell within the Arbitrament, by the meaning of the said Indenture; and Judgment was given against the Defendant. Debt. Proviso taken strictly.

Mich. 28. and 29. *Eliz.* in the Common Pleas.

XLVIII. Partridge *and* Partridges *Case.*

IN Dower by Partridge against Partridge, the Case was, that Land was given to the Father for life, the reversion to his Son and Heir for life, the remainder to the right Heirs of the body of the Father: The Father and Son joyn in a Feoffment to the Uncle in Fee, scil. to the Brother of the Father. The Uncle takes a Wife, the Father dyeth, the Son being his Heir in tail, the Uncle dyeth without issue, so as the Land descendeth to the Son, as Heir to his Uncle, against whom the Wife of the Uncle brought Dower: It was moved, if the Son being Heir in tayl to his Father, and Heir also to his Uncle, for the Fee descended, be now remitted? for then no Dower accrueth to the Wife of the Uncle, for the estate of which she demands Dower is gone: but if the livery in which the Son joyned with his Father be the livery of the Son, the same lyes in his way in the impediment and preventing of the Remitter, so as during his life he shall be adjudged seised of the Lands in Fee-simple by descent from his Uncle: Then Dower lyeth, for the same estate is inherited, of which the Wife demandeth her Dower: And the Court doubted, if it were the livery of the Son or not. And note, that the Feoffment was without deed. See Dyer 16 Eliz. 339. Dower. Remitter.

Mich. 28. and 29. *Eliz.* in the Exchequer.

XLIX. *The Queen against the Lord* Vaux *and others.*

Trin. A Bill of Intrusion was brought for the Queen against the Lord Vaux, Rich. Vaux, and Hen. Vaux, supposing to have intruded into the Rectory and Intrusion.

and Parſonage of Ethelborough in the County of Northampton, and ſhewed that in the time of Hen. the fourth, the College of Saint Peter of Ethelborough was founded at Weſtminſter, in the County of Midd. by the name, Decani & capituli, and ſhewed further, that the Rectory of Ethelborough, was appropriated to the ſaid College, and that afterwards by the Statute of 1. E. 6. the ſaid College was diſſolved, and the ſaid Rectory, amongſt other poſſeſſions of the ſaid College, came to the hands of the King, and that the Defendants, 1. Eliz. intruded into the ſaid Rectory, and took one thouſand Sheep, one thouſand Calves, and one thouſand Loads of Corne, bona & catalla dictæ Dominæ Reginæ provenientia ex decimis rectoriæ predict. apud Weſtm. predict. The Defendants pleaded, &c. That the ſaid College of Ethelborough was founded in Ethelborough, &c. per nomen Decani, canicorum, & fratrum, &c. who leaſed the ſaid Rectory ſo appropriated to one Clark for forty ſix years, in Anno 30. H. 8. who aſſigned the ſame to the Defendants, by force of which they juſtified the taking at Ethelborough, abſque hoc, that the ſaid College of Saint Peter in Ethelborough, was founded, per nomen Decani and capituli Eccleſiæ Sancti Petri de Ethelborough, at Weſtminſter aforeſaid, & abſque hoc, that they took the ſaid Sheep, &c. at Weſtminſter, &c. Upon which the Queens Attorny did demur in Law. Manwood cheif Baron argued, that Judgement ought to be given for the Quern: Exception hath been taken to the Information, becauſe mention is made in it of a College, and it is not ſhewed what perſon was the Founder; And alſo an appropriation is alleadged of the Rectory aforeſaid to the ſaid College, and the Appropriation is not ſhewed certain, who was Patron, Ordinary, &c. as to that he argued, that the alleadging of the Appropriation and foundation, is but matter of ſurpluſage, and therefore the inſufficiency of alledging the ſame ſhall not prejudice the Queen, for it had been ſufficient to ſay, That the ſaid College of St. Peter, was ſeiſed of the Rectory aforeſaid, and then to ſhew, the Statute of Chauntries, 1 E. 6. and the ſame is a good title for the Queen. The poſſeſſion of the College, and the Diſſolution of it by the Statute: For this Bill of intruſion is but in the Nature of a poſſeſſory action, as an action of Treſpaſs, in which caſe it is ſufficient to make title to the poſſeſſion only, without relying upon the right, but as to the curious and exact pleading of an appropriation, or a foundation, it needs not in this caſe, for admit that the College were not well and duly founded, yet ſuch pleading is ſufficient, for a College in Reputation is within the Statute of 1. E. 6. and where the party claimes by or under ſuch Foundation, there Foundation ought to be certainly ſhewed not preciſely, but conveniently, not as we plead a common Recovery, but as we plead the creation of a Biſhop, ſcil. debito modo præfectus, without ſhewing the particulars of the creation; ſo if an Abbot will plead in diſcharge of his Houſe of a Corody, he ought to ſhew the Foundation, and convenient certainty, which ſee L. 5. E. 4. 118. Robert Milam founded the Abby of Leiceſter, and conveyed the right of the Patronage and founderſhip to the King by Attainder, and the ſame was good pleading, without ſhewing the particulars of the Foundation ſpecially, ſo 3 H. 7. 6. in the Caſe of the Priory of Norwich, the pleading is, quod Prioratus de Norwich eſt de fundatione Epiſcoporum Norwich, for in ſuch caſe, refert quis ſit Fundor, ſo the King be not Founder; but in our caſe, non refert quis ſit Fundor, for whoſoever be Founder, whether the King, or a Subject, all is one, the Statute in both Caſes, gives the poſſeſſions to the King: And as to the caſe of Appropriation, the pleading thereof is well, if it be conveniently ſhewed in caſe where the party who ſhewes it, claimes by ſuch Appropriation, as 6. H. 7. 14. 11. H 7. 8. Concurrentibus his qui de jure, &c. without ſhewing the particulars of the Appropriation. Now in our caſe, the Queen is meerly a ſtranger to this Appropriation, and ſhee doth not claime by it, but the poſſeſſion of the College is the title of the Queen, by the Statute of 1. E. 6. and therefore it

Foundation.

Colledge in Reputation.

Generall pleading.

it sufficeth, for the Queen to shew that the Colledge was seised, &c. without making mention of the manner of the Appropriation : And as to the traverse of the County, he conceived, that the County is not traversable in this case, for when the tythes are severed from the nine parts, they are presently vested in the party who hath right, and they are things transitory, and also the taking of them, for the party may take them in any place as well as in his own Parish, scil. as well at Westminster, where the Queen supposeth the taking, as at Ethelborough where the Defendant doth justify, &c. and in such cases the place where is not traversable, See 9 H 6. 62, 63. by Babbington, 35. H. 6. 5. In Trespasse of Goods taken in the Parish of Saint Clements, in the County of Midd. the Defendant did justify by buying in open Market in the County of Essex, there needs no traverse, for the Defendant hath made title by an open Market, 34. H. b. 15, 16. In Trespasse of Battery at D in the County of Essex, the Defendant pleaded, that the Plaintiff made an assault upon him at B in the County of Kent, and the Defendant fled, and the Plaintiff pursued him continually unto D aforesaid, at which place the Defendant did defend himselfe, and so the hurt which the Plaintiff had was of his owne assault, and demanded Judgement if Action, the same is a good Plea without travresing of the County, for a Battery may be continued from one County to another. And it was observed by Manwood in citing of that case, that although, prima facie mirum videri potest that a Battery may be continued from Essex into Kent, because the River of Thames is betwixt them, and yet, re intellecta, it is plaine, for one parcell of Land containing thirty Acres of Lands of the Coasts of Essex is within the County of Kent, see also 34. H. 6. 5. by Prisoit, In trespasse of Goods taken at Coventry, the Defendant doth justify the taking because the Plaintiff gave the said Goods to the Defendant at London, by force of which he took them at London, absque hoc, that he took them at Coventry, and that traverse not holden good for the Defendant by such a gift might justifie the taking of the Goods in any place as well as in the place where the gift was made, but if in such case, the Defendant had pleaded, that the Plaintiff delivered the said goods to him at London to deliver them over to A, by force of which he took them at London, and delivered them over accordingly, in such Cases the Defendant may well traverse the place supposed by the Declaration, for by his Plea he hath confessed an immediate delivery of the said goods to him by the Plaintiff, and the delivery and the taking all at one time and at one place, and it had not been a good plea for the Defendant to say, that the Plaintiff delivered to him the said goods at London, by force of which he took them at Coventry, for the possession is confessed by the first delivery of the goods at London, & the supposal of the Plaintiff of a taking in Coventry, and the justification of the Defendant of a taking by reason of a delivery at London, cannot stand together. But if the Defendant plead, that the Plaintiff gave to him the goods at London, by force of which he took them there, there he may take a traverse to the place supposed by the Declaration, for by the gift it is lawful to the Defendant to take the goods in any place. So see 19 H 6. 35. In false Imprisonment supposed in the County of W, the Defendant doth justifie as Sheriff of the County of B, by force of a Writ to him directed to attach the Plaintiff, and so he attached him and imprisoned him at C in the said County of B, there the Defendant traversed the County supposed by the Declaration, for otherwise he doth not meet with the Plaintiff, and the authority of the Defendant doth not extend to the County supposed by the Declaration. See also to the same purpose 22 E 4. 39. by Hussey, where the difference is taken when justification is by reason of a Warrant to take goods in any place whatsoever, and where in a place certain, as to the traverse of the Foundation, absq; hoc, quod predictum Collegium Fundatum fuit per nomen Decani, & Capituli Ecclesiæ collegiatæ Sancti Petri de Ethelborough apud Westm. he hath here

Traverse.

here traversed that which was not alledged, for the placing of the last words of the traverse, scil. apud Westminst. in the end of the traverse seems by common construction to be intended thereby, that there is no such College at Westm. and not that the College was not founded at Westm. for then the traverse should be, absque hoc, quod collegium predictum fundatum fuit, at Westminster, per nomen, &c. But the most proper traverse, that the Defendant could have taken in this case had been, absque hoc, quod Decanus & Capitulum Ecclesiæ collegiat. de Ethelborough was seised, for the corporation mentioned in the Bill, and that which is mentioned in the Bar, are not all one, but differ in this manner, scil. in the Bill the Dean and Chapter, &c. in the Bar the Dean, Cannons, and Brethren, and perhaps there are two such Corporations, and then both cannot be seised, and therefore upon the seisin of one of them, the traverse shall be taken: And afterwards Judgement was given for the Queen.

Mich. 28. and 29. *Eliz.* In the Common Pleas.

L. The Queen, against the Bishop of *London*, and *Scot*.

Quare Impedit. THe Queen brought a Quare impedit against the Bishop of London, and Scot, and the Case was, that A seised of an Advowson in grosse, holden of the Queen in cheif, alened the same by Fine without Licence; the Church became void, the Conusee presented; The Queen without office found, brought
Office trove. a Quare impedit, the question was, if the Queen without office found should present; And it was argued by the whole Court, that if the Alienation had been by deed only, that there the Queen without office found should not have had the presentment, for upon such an Alienation by matter in fact,
Scire facias. without Licence no Scire facias should issue without office found of the Alienation, but upon an Alienation without Licence by matter of Record, a Scire facias lyeth before office, which was granted by the whole Court: And in the last case the Queen shall have the meane profits from the time of the Scire facias returned, but in the first case from the time of the office found, See for that Stamford Prerogative, fol. last but one, 8 E. 44. It was also moved, if the Queen intituled to the presentment as above, pardoneth to the Conusee all Alienations without Licence, and Intrusions, if the estate of the Incumbent be thereby confirmed, but the Court would not argue that point, but it was adjorned untill another day.

Mich. 28. & 29. *Eliz.* In the common Pleas.

L I. Braybrooks Case.

Fines levyed. THe Case of one Braybrook was moved, which was, Land was given to A for life, the Remainder to B for life, the Remainder to the said Braybrook in Fee: B being in possession levyed a Fine to a stranger, sur conusans de droit come ceo, &c. A dyed, if now Braybrook might enter for the forfeiture, was the question: And it was agreed by the whole Court, that by that Fine the Remainder in Fee is not touched, or discontinued, but because B had done as much as in him lay for the disposing of Fee-simple by the Fine, and hath taken that upon him, the same amounts to a forfeiture: And it was also
Forfeiture. agreed by Anderson and Periam, that if Tenant for life in possession levyeth a Fine, &c. if the Lessor doth not enter within five years after he shall be bounden: Windham contrary, for by him it is in the election of the Lessor to reenter immediatly for the forfeiture, or to expect the death of the Lessee.

Mich.

Mich. 28. & 29. *Eliz.* In the Exchequer Chamber.

LII. *Willshalge* and *Davidges* Case.

Willshalge brought Error in the Exchequer Chamber, upon the Statute of 27. Eliz. Cap. 8. against Davidge, upon a Judgement given in the Kings Bench, Hill. 28. Eliz. and assigned for Error, that where Davidge had heretofore brought Debt against the now Plaintiff, and declared upon diverse Contracts, scil. that he had sold to Willshalge such Merchandizes for so many Portagues, and such Merchandizes for so many Ducats, which in toto amounted to seven hundred pounds Sterling. which sum he demanded, scil. in Sterling mony, and not in Ducats and Portagues, according to the Contract; And upon the Declaration the said Willshalge had demurred in Law, and the Court gave Judgement for the Plaintiff, for it is in his election to divide his debt in which of those Coynes he pleased, either in the proper coyne of the Contract, or of Sterling, scil. in currant mony. And afterwards the said Judgment was affirmed. Error.

Mich. 28. & 29. *Eliz.* In the Exchequer.

LIII. *Henly* and *Broads* Case.

Henly brought Tresspasse against Broad in the Kings Bench, and declared, that the said Defendant, simul cum quodam I S clausum suum fregit, &c. The Defendant pleaded to Issue, and it was found for the Plaintiff, and it was objected in stay of Judgement, that the count was not good, for it appeareth therein, upon the shewing of the Plaintiff himselfe, that the Action ought to be brought against another also, not named in the Writ, and because the same appears of the Plaintiffs own shewing, the Declaration was not good, and notwithstanding that said Exception, Judgement was given for the Plaintiff. Upon which Broad brought a Writ of Error, and assigned the same matter for Error; And there the Case of 2 H. 7. 16. 17. was cited, where a difference is taken, where the Plaintiff declares, that the Defendant with one B did the Tresspasse, him naming in certain, and where the Declaration is, that the Defendant, cum quibusdam aliis ignotis, &c. vi. 8. H. 5. 5. And at length all the Justices of the common Pleas, and Barons of the Exchequer were clear of opinion, that by the common Law the Declaration was not good, for the reason, and upon the difference aforesaid: but if in Tresspasse against one, who pleads that the Tresspasse was done by himselfe and one B, to whom the Plaintiff hath released, and the Plaintiff traverse the Release, in that case, for as much as the matter doth not appear upon the Plaintiffs own shewing, but comes in on the part of the Defedant, and not denyed by him, the Declaration is good enough: And it was further agreed by them all, that now this defect after Verdict is helped by the Statute of 18. Eliz. for it doth not concerne substance but only forme: And afterwards the first Judgement was affirmed. Tresspasse. Counts. Error.

Mich. 28. & 29. *Eliz* In the Common Pleas.

LIV. *Wood* and *Foſters* Caſe.

Replevin.

WOod brought a Replevin againſt Humfrey Foſter and others; and made his plaint of the taking of one thouſand Cattel. Foſter pleaded, Non cepit, and the others, that the property was in another; upon which matters they were at iſſue. And as unto the firſt iſſue, the Caſe upon the Evidence was: that the late Lord Windſore was poſſeſſed of certain Sheep, and by his Will deviſed them unto Eliz. his Daughter for her advancement in marriage, and of his Will made his Wife his Executrix, and dyed, his Wife took to her Husband one Puttenham, who being thus poſſeſſed leaſed the ſaid Sheep with a Farm for eleven years by Indenture, upon which it was agreed between the ſaid parties, that the Leſſee ſhould keep ſo much of the Rent reſerved upon the ſaid Leaſe, to buy therewith ſo many Cattel over, as the whole ſtock of the ſaid Sheep upon the ſaid Farm ſhould amount to the number of one thouſand Cattell; and the Leſſee alſo covenanted to yeild and render to the ſaid Puttenham at the end of the ſaid Term one thouſand Sheep between two years ſhorne, and four years ſhorne. Afterwards Puttenham by his deed gave unto one A, who had married the ſaid Eliz. the ſaid one thouſand Cattel, to have them after the ſaid Term; the Term expired; Puttenham ſold and granted them unto Wood, who brought them away with him. And the ſaid A pretending that the ſaid Sheep paſſed to him by the ſaid grant of Puttenham during the ſaid Term, ſeiſed them, and the ſame was noctanter as they were driven in the high-way, unde magna contentio orta fuit between the ſaid parties, the one charging the other with felony, whereupon the Conſtable of the Town where, &c. ſuppoſing the ſaid matter would grow to an Outrage, ſeiſed the ſaid Cattel as felons goods, and afterwards went to the houſe of the ſaid Foſter, which was near unto the high-way, and asked his adviſe upon the matter, but he would not meddle therewith: Afterwards one Perkins, who had bought the ſaid Cattel of the ſaid A, came to Foſter, and ſhewed to him, that the high-ways there were not ſufficient for paſturage of the ſaid Cattel until the ſaid controverſie be determined, and prayed that the Cattel be delivered to him the ſaid Perkins to keep in the mean time, to whom Foſter anſwered, that if the ſaid Perkins would find ſufficient ſureties to deliver back the Cattel to him who had right, that he would be content the ſaid Perkins ſhould take them; whereupon the ſaid Perkins was bound to Foſter to that purpoſe, and took away with him the ſaid Cattel. And it was alſo given in Evidence, that the ſervants of the ſaid Foſter had ſeiſed the Cattel for the uſe of their Maſter. And by the clear opinion of the Court upon the whole matter ſhewed, Foſter, Non cepit, and according to ſuch direction of the Court the Jury found that Foſter, non Cepit; and as to the matter of property, the Court was clear of opinion, that the grant made by Puttenham of the ſaid Cattel, during the Term, was utterly void, for Puttenham during the ſame Term had not in the ſaid Cattel either a general or a ſpecial property, nor alſo after the Term. but if after the Term expired, the Leſſee will not according to his covenant deliver to Puttenham one thouſand Sheep then Puttenham is put to his Action of covenant, for here the Leſſee was bound to deliver to Puttenham at the end of the Term, not the ſame Cattel which were leaſed, but ſuch a number of Sheep, and the ſame ought to be between two yeares ſhorne, and four yeares ſhorne, which could not be the Sheep demiſed, for they did exceed ſuch degree before the end of the ſaid term, and then the grant of Puttenham during the Term is meerly void: And then when after the Term, the Leſſee, according to the covenant, delivered to Wood one thouſand Sheep, he might well ſell them to the Plaintiff; And ſuch was the

the opinion of the whole Court, and it was said by Justice Windham, that if I let certain Sheep to one for two yeares, now upon that Lease somewhat remaines in me, but that cannot be properly said a Property, but rather the possibility of a Property which cannot be granted over. See 11 H 4. 177. 178. 22 E 4. 10. 11. In the same plea it was also holden, that in a Replevin where the plaint is of one thousand Beasts, and the Defendant justifies by reason of property, upon which the parties are at issue; Now upon the Evidence the Defendant may surmise a lesser number of Beasts, and drive the Plaintiff to prove a greater number then that which the Defendant hath confessed upon the Evidence. Notwithstanding that the number set down in the plaint be by the plea of the Defendant quodum modo admitted, and the lesser number surmised, and the contrary not proved shall go in mitigation of the damages, and the Jury shall conform their verdict in the right of damages, according to the proof of the number, notwithstanding that the number set forth in the plaint be not by the Plea denyed by the Defendant, and so it was put in ure in this Case: for the Plaint was of the taking of one thousand Cattel, but the proof extended but to eight hundred sixty five. Note also in the same Plea it was holden, that whereas one Chock was returned upon several Juries in two several Courts at Westminster, and both the Juries are adiourned to one day; now in which of the said two Courts the said Chock was sworn, he shall be discharged of his attendance at the other Court the same day. Property.

Mich. 28. and 29. *Eliz.* in the Common Pleas.

LV. Carters *Case.*

CArter brought an Action upon the Case against I S, and declared, that A was possessed of certain Lands for years, the Inheritance thereof being in the Wife of the Plaintiff, upon which Lease a Rent was reserved: The Defendant, in consideration that the Plaintiff would procure the said A to assign the said Lease to the Defendant, promised to pay the said Rent to the Plaintiff for all the residue of the Term: It was objected, that upon this matter the Action doth not lie, because that the Plaintiff hath a higher remedy, scil. an Action of Debt or Distresse; but the opinion of the whole Court was, that the Action did lie, for here upon the promise an Action is given to the Husband alone in his own right, whereas the Rent is due to the Husband in the right of his Wife in its nature, and the Rent is also to be paid for the Land, But upon this Assumpsit it is payable to the person of the Husband. And afterwards Judgement was given for the Plaintiff. Assumpsit.

Mich. 28. & 29. *Eliz.* In the common Pleas.

LVI. *Kimpton*, and *Bellamyes Case.*

GEorge Kimpton brought a Replevin against Wood and Bellamy, who make Conusance as Baylies to George Burgain for Damage Feasance, the Plaintiff in Bar of the Conusance, sheweth; That he himself, and all those whose estate he hath in one hundred and forty Acres of Land, time out of mind, &c. have had common for all manner of Cattell in six Acres of Lands whereof the place where, &c. is parcell, and so put in his Cattell, &c. against which, the Defendants say, that the Plaintiff, &c. had common in forty Acres of Land, whereof the said six Acres are parcel, all lying in Communi campo, and that the Plaintiff, a long time before the taking, had purchased two Acres parcel of the said forty Acres, &c. upon which there was a demurrer in Law; Replevin.

It was argued by Serjeant Shutleworth, that the Replication to the Bar to the Avowry is not good, for in the Bar to the Avowry, the Plaintiff hath shewed, that he hath common in six Acres, and the same shall be intended common in the six acres only, for common in forty acres cannot be the common in six acres; as 35 H 6. 38. In Debt for Rent reserved upon a Lease for years, the Plaintiff declared that he leased to the Defendant ten acres of Land, rendring the Rent in demand, the Defendant pleaded, that the Plaintiff leased to him the said ten acres, and also such a Rectory, rendring the same Rent, the same is no plea without traverse, absque hoc, that he leased the ten acres only: See Dyer 29 H 8. 32. And the whole Court was clear of opinion, that for want of such traverse, the plea is not good, for by Periam the Common supposed in the barre to the Conusans out of the six acres, cannot be intended the Common supposed in the Replication, scil. out of the forty acres. And by him, If in Trespasse the Defendant justifie by reason of common in six acres of Land, upon which the parties are at issue; and the Defendant in Evidence shews, that he hath common in forty acres, whereof the said six acres parcel, the same doth not maintain his title, but the issue shall be found against him: But by the Lord Anderson, because that this Demurrer is general, the other party shall not take advantage of that defect of pleading, for the want of the Traverse, and that by reason of the Statute of 27 Eliz. For Traverse is but matter of form, and the want of the same shall not prejudice the other party in point of Judgement, but the Judges ought to judge upon the substance, and not upon the manner and form of the pleading: And as to the matter of the Common, the Court was clear of opinion, that by the purchase of the said two acres, the whole Common was gone.

Traverse.

Extinguishment.

Mich. 28. and 29. *Eliz.* in the Common Pleas.

LVII. Knights *Case.*

KNight brought Debt against three Executors, and now surmised by his Councel, that one of the Executors is dead, pendant the Writ; and prayed the opinion of the Court, if the Writ should thereby abate or not, for by some it is not like where a Writ is brought against two Executors, for there if any of them dyeth, pendent the Writ, it shall abate, for now the plural number is gone, for there is now but one Executor, but in our Case the plural number continues: But notwithstanding that, the Court was clear of opinion, that the Writ should abate: Wherefore the Plaintiff seeing the opinion of the Court, prayed that upon his surmise aforesaid, he might have a new Writ by Journeys Accounts, which was granted to him.

Debt.

Abatement of Writ.

Mich. 28 and 29. *Eliz.* in the Common Pleas.

The Queen and Middletons *Case.*

THe Queen brought a Quare Impedit against Middleton, and counted, that W Lord Say was seised of the Manor of Beddington in the County of Hertford, to which Manor the advowson of the Church was appendant, & ad Ecclesiam predict. presentavit Coo Clericum suum, and afterwards dyed seised, having issue two Daughters, Mary married to the Earl of Essex and Ann to the Lord Mountjoy, who make partition, and the said Manor of Beddington, inter alia, was allotted to the said Mary for her part; and afterwards the said Earl and Mary dyed, having issue Ann, who took to Husband the Marquesse of Northampton, and afterwards 33 H 8. a Fine was levyed of the

Quare Imped.

the said Mannor inter &c. Querent. and the said Marquesse and Ann Defor-ceants, by which Fine the said Mannor was granted and rendred to the said Marquesse for term of his life, the remainder to the said Ann his Wife in tayl, the remainder over to Hen. the eigth in Fee; the Marquesse is attainted of High Treason, by which the King seised, and afterwards Ann dyed without issue, after which in the seisin of the Queen that now is the Church voided, by which it belonged to the Queen to present; The Defendant did confesse the seisin of the Lord Say, and the whole matter contained in the Count until the Attainder; and pleaded further, that after the said Attainder Queen Mary leased the said Mannor with the advowson to Rotchester and Walgrave for forty yeares, if the said Marquesse should so long live, who were possessed accordingly, and in their possession the Church became void, to which Avoidance one Twiniko did present the Defendant, who upon his presentment was instituted and inducted: Upon which Plea the Queens Serjeant did demurre in Law. It was argued by Serjeant Shutleworth for the Queene, That the counter-pleading of the title of the Queen by the Incumbent, without shewing title in his own Patron could not be good, notwithstanding the Statute of 25 E 3. Cap. 7. before which Statute, the Incumbent could not plead any matter which went to the right of the Patronage, but only in discharge or excuse of the disturbance, and therefore we ought to observe the words of the said Statute, sc. the possessor shall be received to counter-plead the Kings title, and to have his Answer, and to defend his Right upon the matter, although he claim nothing in the Patronage; upon all which words taken together it appeareth, that the Incumbent ought not only counter-plead the title of the King, but also ought to shew and defend his own right, and that hath not the Defendant done here; For Twiniko, of whose presentment he is in the Church, doth not claim under the lease made by Queen Mary to Rotchester and Walgrave, but during their said Lease and their possession of it, by usurpation presented the Defendant, 46 E 3. 13. by Finchden: The King brought a Scire facias upon a Recovery in a Quare Impedit, the Defendant being Incumbent pleaded, that after the said Judgement the King had presented to the said Church I S his Clark, who was admitted accordingly; and exception was taken because the Defendant did not shew a title in himself to maintain his possession, but it was not allowed; for a difference is taken betwixt a Plea in a Quare Impedit, and a Plea in a Scire facias, for in a Scire facias it is sufficient to extort the Plaintiff of execution without any title, contrary in a Quare impedit: And it is a general Rule, that in all Cases where an Office is to be traversed, none shall be received to traverse the title of the King, without making a title to himself, which see 38 E 3, 18. So in the Case of the Lady Wingfield, 3 H 7. 14. and Stamford 63. 64. And it is true in Actions reall it is sufficient to traverse the title of the Demandant, without making title to the Tenant himself: As in a Formdon, Ne dona pas; But in Actions personall it is otherwise, as 2 H 4. 14. In Ravishment of Ward, it is not sufficient to traverse the title of the Plaintiff, but the Defendant ought also to make title to himself: Fenner Serjeant contrary: who took exception to the Writ, because it is brought against the Incumbent only without naming the Patron or Ordinary: For here the Defendant hath pleaded, that he is Parson imparsonee of the Church aforesaid of the presentment of the said Twiniko, and that he is admitted, instituted and inducted, and hath continued in his Church so many dayes and years, in which Case the Writ ought to have been brought as well against the Patron and Ordinary, as against him the Incumbent: But in some Cases it is sufficient against the Incumbent only, as upon a Collation by Lapse, 9 H 6. 32. by Babbington: So where the Defendant is disturber without any presentment, 7 H 4. 93. so where the Defendant was deprived, and kept himself in 4 E 4. 18. So where the Pope makes Provision, 11 H 4. Quare Impedit 120. So a Sci. fac. upon a Recovery

Where in pleading the party must make title to himself.

very in a Quare Imped shall be brought against the Incumbent only, 1 H 5. 8. for by the Judgement in the Quare impedit, the right of the Patronage is bound; and the Scire facias is only for the possession which concernes the Defendant only, and no other. And to prove that by the Common Law, a Quare Impedit lay not (but upon such special matter) against the Incumbent alone, it is clear upon the said Statute of 25. E 3. For before the said Statute the Incumbent could not plead any matter which did trench to the right of the Patronage, and therefore we ought not to presume, that the common Law was so unreasonable, to give an Action against a singular person, who could not by the Law shew and defend his own right, nor traverse the right of the other party: And as to the plea here, he conceived that the same plea which the Patron might have now after the Statute of 25 E 3. the Incumbent shall have; but he who is only a disturber not in by presentment, &c. he shall not plead any matter but in discharge or excuse of the disturbance, 47 E 3. 8 The King in a Quare Impedit counted. That King H was seised, and presented one A, King H dyed, and the Advowson descended to King E 3. A dyed, the now King presented B, and now B is dead, so it belong to the King to present, that the Defendant being Incumbent traversed the institution and induction of B, without making title to himself. So 44 E 3. 19. in a Quare Impedit the King declared that he himself was seised and presented one B, who at his presentment was received, &c. B dyed, by which it belonged to the King to present; to which the Defendant being Incumbent pleaded, that the said B is yet alive, and that plea was allowed without other title made to himself. Note, that at the first Argument of this case, that the Court was of opinion against the Defendant, because he had not in his plea any interest in the Advowson, and by Periam the Patron himself could not have had such plea if he had been party to the Writ, therefore not the Incumbent, and it is no good pleading in any Action, to discover in pleading any wrong, as force, disseisin, usurpation; But at the length, Mutata opinione, all the Justices were agreed, that Judgment should be given against the Queen: And the Lord Anderson shewed openly, the reason of their Judgement, for here is not bare usurpation pleaded against the Queen, but also an estate, scil. a lease for years in the said Advowson derived from Queen Mary, and that the Avoidance upon which the Action is brought falleth within the said Term, so as the Queen who is Plaintiff is encountred with the Lease of her Ancestor, against which she cannot make title to present, without special matter; wherefore Judgement was given against the Queen.

Mich. 28. and 29. *Eliz.* in the Common Pleas.

LIX. Kynters *Case*

Debt.

KYnter brought debt upon an Obligation, the condition was, that whereas the Plaintiff had bought of the Defendant a Ship, if then the Defendant shall enjoy the said Ship, with all the furniture belonging to the same, without being disturbed for the said Ship or any furniture appertaining to it; that then, &c. and the Case was, that after the sale of the said Ship a stranger sued the Plaintiff for certain moneys due for certain ballast bought by the Defendant for the same Ship and put into the said Ship before the sale of it, and in the said sute the Plaintiff obtained a Judgement and Execution, and thereupon the said Ship was seised, and all the matter was, if Ballast be furniture of a Ship or not; And it was moved by Serjeant Gawdy, that it was; for Ballast is as necessary to a Ship as a Sail; but the Court was against him, for sometimes a Ship may sail without Ballast, for it may be laden with such Merchandizes which are convenient Ballast in themselves, as Coals, Wheat,

Wheat,&c. Periam at the first doubted of it: and by him, if I be bound upon condition, ut supra, I am bound to deliver the Guns being in it at the time of the sale,but yet he conceived, that the Plaintiff should be barred because he had not specially shewed,that at the time of the sale, that the ballast was in the Ship.

Mich. 28. and 29. *Eliz.* in the Common Pleas.

LX. Pendleton *and* Gunstons *Case.*

PEndleton informed against Gunston upon the Statute of 13 Eliz. Cap 5. for that, where the said Pendleton had before brought a plaint of Debt against I S in the Guild-hall of Norwich, upon which issued out of the said Court an Attachment against the said I S, by which the Sheriff of Nor. being ready by virtue of the said processe to attach the said I S by his goods, there, the now Defendant in disturbance of the said processe and the execution of it, did publish and shew to the Sheriff a conveyance, by which he claimed the said goods as conveyed to him by the said I S, &c. and averred the fraud, &c. and it was moved by Serjeant Snagg, that the matter of which the Defendant is charged is not within the said Statute, because the doubting of the said conveyance doth not go in delay of the execution, for no Judgment is given but only in delay of processe; but the Court was clear of opinion to the contrary, and that by reason of the Statute and the words of it, scil. delay, hinder, or defraud Creditors of their just and lawful Actions,suits, &c. for here is a delay;for for want of serving the said Attachment,the Appearance of I S to the suite of the Plaintiff is delayed, which mischeif is within the remedy of the said Statute. And Periam and Rhodes Justices conceived, that such a doubting of such conveyance,where no suite is depending is within the said Statute, which Anderson doubted. See the pleading of this Case reported in the second Book of Entries, 207. 208. 30 Eliz. per quod secta fuit, impedita fuit, &c.

LXI. *Mich* 28 and 29 *Eliz.* in the Common Pleas.

FEnner Serjeant moved this Case. An Alien purchaseth Lands in Fee; The Queen confirms it to the Alien, Office is found,if the confirmation shall bind the Queen; and it seemed to some that it should, for by the Lord Anderson,when an Alien is enfeoffed he receiveth by the Livery the Fee-simple,of which he shall be seised,until Office be found,and a Precipe quod reddat lyeth against him. And by Fenner an Alien and Denizen Joynt-tenants are disseised,they both shall joyn in Assize,vide 11 H 4. 26. and by him,the Kings Seise being an Inheritrix takes a Husband, and have issue, Office is found, the Husband shall be Tenant by the Curtesie,which see 33 E 3. Traverse 36. It was argued of the other side,that the estate of the Alien is so feeble, that a confirmation cannot enure upon it, for an Alien cannot take but to the use of the King,and cannot be enfeoffed to another use,and if he be, such use is void, for there is not a sufficient seisin in the Alien to carry an use, and it hath been adjudged in the Case of one Forcet, that where an Alien and the said Forcet were Joynt-purchasors, and the Alien dyed, Forcet had not the whole by the Survivor,but that upon an Office found,the Queen should have the moyety: See Dyer 11 Eliz. 288.

Alien Purchasor.

Confirmation.

Mich.

Mich. 28. and 29. *Eliz.* in the Common Pleas.

LXII. *Sir* Roger Lewknor *and* Fords *Case.*

SIr Roger Lewknor seised of the Mannor of Wallingford, leased the same to A for years, and dyed, after which it was Enacted by Parliament, That the said Mannor should from henceforth be deemed and reputed in the Heirs of the body of the said Sir Roger, begotten upon Elizabeth his Wife, the said Sir Roger having three Daughters only, without any other issue: The Daughters married Husbands and had issue: A assigned his interest in the said Mannor to B, C and D, and also to one Shelley; B, C, and D assigned their interest to one Sponer, one of the Defendants, and Shelley assigned his fourth part to Ford another of the Defendants, excepting the Woods and Underwoods. Wast is committed; one of the Daughters having issue dyeth, living her Husband, the two surviving Sisters and their Husbands, the Term being expired, brought a Writ of Wast, leaving out the Husband of the third Sister, who was Tenant by the Curtesie, against Shelley and Sponer, who tenuerunt. Shutleworth Serjeant took Exception to the Writ: scil. predictus Rogerus cujus hæredes ipsæ sunt, which shall be intended Heirs general, and by the Declaration it appeareth, that the Daughters have to them by Act of Parliament an especial inheritance as Heirs in special tail, and that by a special conveyance: and therefore the Plaintiffs ought to have brought a special Writ, according to their Case, as where Cestuy que use, maketh a lease for years by the Statute of 1 R 3. and the Lessee committeth Wast, now the Feoffees ought to have a special Writ of Wast, according to their Case, 26 H 8. 6. but that exception was disallowed, and the case cited out of 26 H 8 is upon another reason, for in such case the estate of the Lessee for years is created by the said Statute. Another Exception was taken to the Writ, for the Writ is tenuerunt, which shall be intended prima facie, conjunctim tenuerunt, and in the Declaration it appeareth, that one of the Defendants is assignee of three parts of the Lands demised, and the other Defendant of the fourth part, and so separatim tenuerunt, but that Exception was also disallowed, because originally it was one, and intirely demised interest and estate, and so it remaineth as to the Plaintiffs, although it be divised by the Lessee himself. Another Exception was taken to the Writ, because here it appeares upon the Plaintiffs shewing, that Sir Roger Lewknor had three Daughters, and that they have all taken Husbands, and that they have issue, and that one of the said Daughters is dead, living her Husband, who is not named in the Writ, for which cause the Writ shall abate: See 22 H 6. 24. 25. But that Exception was also disallowed, for as this Case is, there is not any reason, that the Tenant by the Curtesie should joyn in this Action, for no judgment shall be given here, that the Plaintiffs shall recover the place wasted, for the term is expired, as it appeareth by the words of the Writ scil. quas tenuerunt, and the Tenant by the curtesie is in possession, and where Tenant by the curtesie and the Heir joyn in an Action of Wast, Tenant for life shall have Locum vastatum, and the Heir the damages, which see 27 H 8. 13. As unto the matter of Law, upon the Exception of Woods and Underwoods, it was argued by Shutleworth, that the Action of Wast was not well brought against Ford, &c. for the Assignment made by Shelley to Ford was with an exception of all Woods and Underwoods, and therefore Shelley remained Tenant, and he ought to answer for the Wood and the Underwood in the Action of Wast, for upon every demise of Lands the Woods there growing are as well demised as the Land it self, for so it appeareth by the Writ of Wast in domibus & boscis dimisses ad terminum annorum, &c. which proves, that the Trees

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are parcel of the demise, and so may be excepted: See Dyer 28 H 8. 19. by Shelley and Baldwin. A man leaseth a Manor, except Woods and Underwoods, the Lessee cuts the Trees, an Action of Wast doth not lie against him for the same, for the thing in which the Wast is supposed to be committed was not demised, &c. and therefore the Lessee shall be punished as a Trespassor and not as Farmer: Fenner Serjeant contrary, and that the Exception of the Woods and Underwoods is meerly void, for Shelley who assignes his interest with the said Exception, hath not any such interest in the Woods and Underwoods, so as he can make such exception, for he had but an ordinary interest in them as Farmer, viz. House-boot, Hedge-boot, &c. which interest cannot by any meanes upon an Assignment be reserved to the Assignor, in grosse of the estate, no more than if one hath common appendant to his Land, and he will make a Feoffment of the Land, reserving or excepting the common. And he who hath the inheritance of the Land hath an absolute property in the Trees, but the Lessee hath but a qualified interest, and therefore 21 H 6. 46. the Lessor during the term for years may command the trees to be cut down: and 10 H 7. 3. Lessee for years hath not any interest in the trees, but for the loppings, and for the shaddow for his Cattel: And in the Case cited, where Lessee for life and he in the Reversion make a Lease for life unto a stranger, and wast is committed, and they bring an Action of Wast, the Lessee for life shall have the place wasted, and he in the Reversion the treble damages, for in him was the true and very property of the Trees, and therefore the treble damages do belong unto him, and not to the Lessee for life, who joyneth with him; and the reason wherefore the Lessee for life or yeares shall recover treble damages against a stranger who cuts down any trees growing upon the Land to him demised, is not in respect of any property that the Lessee hath in the trees cut down, but because he is chargeable over to his Lessor in an Action of Wast, in which he shall render damages in such proportion. So see 27 H 6. Wast. 8. A lease for life is made without impeachment of wast, a stranger of his own wrong cuts down trees, against whom the Lessee brings an Action of Trespasse; in such Case he shall not recover treble damages, not for the trees, but only for the breaking of the Close, and the loppings, for he is not chargeable over to hys Lessor for the same, because that his Lease was made without impeachment of Wast; and if the Lessee hath such a slender interest in the Trees where his lease is without impeachment of wast, his interest is lesse, where it is an ordinary lease without any such privilege: And the property which the Lessee for years hath in the Trees in such Case, is so appropriated to the possession, that it cannot be severed from it: Windham and Anderson Justices were of opinion, that the Exception above is meerly void: For Ford the Assignee of Shelley is now Termer and Farmer, who alone can challenge interest in the Trees against all but the Lessor, and Shelley after his Assignment, is meerly a stranger. The interest of the Lessee, and also of his Assignee in the Trees is of necessity, and follows the Farm and the Land as the shadow doth the body; And by him, where Lessee for years by reason of his lease is to have Wind-fals, yet he cannot imploy them but to the benefit and profit of his Farm, for if he sell them or spend them elsewhere he shall be punished. Rhodes and Periam Justices, that the exception is good as the fruits of the Trees, Shovelers, &c. And afterwards the Case was adjudged upon another poynt in the pleading, so as the matter in Law did not come to Judgment: See Saunders Case. 41 Eliz. Where Lessee doth assigne, excepting the Timber trees, it is a void Exception.

Pasch. 29. *Eliz.* in the Kings Bench.

LXIII. Gray *and* Jeffes *Case.*

Action of assault and Battery.

IN an Action upon the Case by Gray against Jeffe, the Plaintiff declared, that where he had placed his Son and Heir apparent with the Defendant, to be his Apprentice, and to learn of him the Art of a Tailor: That the Defendant had so beaten his Son with a Spade, that he thereupon became lame, by reason of which he could not have so much with his Son in marriage of him as otherwise he might have, because the same lameness is a disparagement to his said son: And further shewed, that he himself might spend twenty pounds per annum in Lands. Haulton argued for the Plaintiff. The Action, Quare filium & hæredem cepit & abduxit, is given to the Father in consideration that the marriage of his Son and Heir doth appertain to him by the Law, and here by the Battery the Son is become so lame, that he is not so commendable to a Marriage as before; and if the Father had lost the whole marriage, then the Father should have had the Action Quare filium & hæredem, &c. but here he hath not lost the whole marriage, but the marriage is lessened by it, and therefore he shall have this Action. Tanfield contrary; I confesse, that the Father ought to have the marriage of his Son and Heir so long as he is sub potestate patris; but here the Father hath committed all his interest, power and authority in his Son to the Defendant his Master, with whom he hath bound his Son Apprentice for seven years, during which term the Father hath not any thing to do with his Son or his Marriage. Wray: the Action, Quare filium & hæredem, &c. is not given to the Father, because his marriage belongs to him, but because of the Education; and such was the opinion of Clench Justice, and the marriage doth not belong properly to the Father: For if the Son marrieth himself without the leave of the Father there is not any remedy for the Father. And afterwards Judgement was given against the Plaintiff.

Pasch. 29. *Eliz.* In the Common Pleas.

LXIV. Bullers *Case.*

Replevin.

EDmund Buller brought a Replevin against two, who make Conusans as Baylies to A for rent arrear reserved upon a lease for life, To which the Plaintiff in Barre of the Conusans pleaded, that two strangers had right of Entry in the place where, &c. and that the said two Defendants by their Commandment entred, &c. and took the Cattel of which the Replevin is brought, damage feasants, absque hoc, that they took them as Baylies to the said A, and upon that Traverse the Defendants did demurre in Law, Shutleworth Serjeant; the Traverse is not good, for by that means the intent of the party shall be put in issue, which no Jury can try, but only in Case of Recaption. See 7 H 4. 101. by Gascoign. If the Bayly upon the distresse shews the cause and reason of it, he cannot afterwards vary from it, but the other party may try him by Traverse; but if he distrain generally without shewing cause, then he is at large to shew what cause he will, and the other party shall answer to it. And it was said by the Court, that when a Bayly distreins he ought, if he be required, shew the cause of his distresse, but if he be not required, then he is not tied to do it. Anderson. We were all agreed in the Case betwixt Lowin and Hordin, that the Traverse, as it is here, was well taken. The Number Rollof that Case is M. 28 and 29 Eliz. 2494.

Pasch.

Pasch. 29. *Eliz.* in the Kings Bench.

LXV. Hudson *and* Leighs *Case.*

HUdson recovered against Leigh in an Action of Battery, for which a Capias pro fine issued against Leigh; and also a Capias ad Satisfaciendum, returnable the same Term at one and the same Return: As to the Capias pro fine the Sheriff returned Cepi, and as to the Capias ad satisfaciendum, non est inventus: And for this contrariety of the Return, the Court was of opinion, that the Sheriff should be amerced; but it was moved by the Councel of the Sheriff, that the awarding of the Capias pro fine was meerly void, for the Fine is pardoned by the Parliament, And it is also Enacted, That all processe awarded upon such Fines shall be void, and then the Capias pro fine being void, it matters not how or in what manner it be returned, for the Court shall not respect such processe, nor any return of it, and then the Court not having respect to that Return, there is not any contrariety, for the Capias ad satisfaciendum only is returned, and not the Capias pro fine. And at another day it was moved again; the Battery was supposed, 1 Junii 1586. and Judgement given the thirteenth of February the same year, upon which issued Capias pro fine, and before the Return thereof the Parliament ended, which pardoned such Fines, and made all processe thereupon void: And it was said by the Court, that if the Sheriff in such Case takes the party by a Capias pro fine, now upon that taking he is in Execution for the party, and if the Sheriff let him go at large, he shall answer for the escape: And in that case the Capias pro fine was well awarded, and the Court ought to regard it, and the Defendant lawfully taken by virtue of it, and also in execution for the party in Judgement of Law, and afterwards when the Parliament came and Enacted ut supra, although the processe be made void thereby, the same ought to be meant as to the interest of the King in the Fine, and the vexation of the Subject by it, but not as to the Execution of the party, but the Sheriff shall answer for that. And it was also holden by the Court, that if the Plaintiff sueth an Elegit then upon the Capias pro fine executed, the Defendant shall not be adjudged in Execution for the party, for he hath made his Election of another manner of Execution, scil. of the Land, and he shall never resort to an Execution of the body, 13 H 7. 12. And as our case is here there was an Elegit obtained, but it was not on Record, nor any Record made of it, and therefore the election of the Execution remained to the Plaintiff; And as to the point aforesaid, that such processe shall be void, as to the King only, not as to the party: See now 5 Jac. C 6. part. 79. Sir Edward Phittons Case.

Process.

Return of the Sheriff.

Escape.

Execution.

Pasch. 29. *Eliz.* In the common Pleas.

LXVI. Potter *and* Stedals *Case.*

IN Trespasse by Samuel Potter against Stedal the Case was, Tenant for life of Land leased parcel thereof to hold at Will, and being in possession of the residue, levyed a Fine of the whole, the Lessor entred into the Land which was let at will in point of forfeiture, in the name of the whole; it was holden the same is a good entry for the whole: But if the Disseisor leaseth for years part of the Land, whereof the disseisin was committed, and the disseisee afterwards entreth into the Land which continueth in the possession of the Disseisor in the name of the whole; the same Entry shall not extend to the Land leased, for here the Lessee is in by title, but in the other Case not, for when Tenant for life leaseth it at will, and afterwards levyes a Fine, the same is a determina-

Trespasse.

Entry.

tion of the Will. 16 Eliz. Dyer 377. 1. In the same plea it was holden, that if there be lessee for life, the remainder for life, the remainder in fee, Lessee for life in possession levyeth a Fine Sur Conusans de droit, &c. to his own use, upon that Fine a Fee-simple accrues.

Pasch. 29. *Eliz.* in the Common Pleas.

LXVII. Leigh *and* Hanmers *Case.*

Debt upon a Recognizance

THomas Leigh Esquire brought an Action of Debt upon a Recognizance in the nature of a Statute Staple against John Hanmer Esquire, before the Mayor and Aldermen of London, in Camera Guild-hall Civitatis predict. and demanded one thousand five hundred pounds, upon such Recognizance acknowledged 20 November, 20 Eliz. and upon default of the said Hanmer, according to the custom of London used in course of Attachment, attached six hundred pounds in the hands of one W Bolton of Grays-Inne, in part of satisfaction of the said debt of one thousand five hundred pounds; and now within the year came the said Hanmer, & ad discutionandum debitum predict. had a precept of Scire facias against the said Thomas Leigh, and after pleaded, and demanded Dyer of the said Recognizance, and had it, & quod ipse restitutionem of the said six hundred pounds, in manibus dict. W Bolton attachiat habere debet: And upon the whole Record the Case was thus: Rowland Leigh Esquire, being seised of certain Mannors and other Lands in the County of Gloceſt. had issue Eliz. his Daughter and Heir inheritable to the said Lands, and by Indent. dat. 20 Maii 19 Eliz. granted Custodiam, regulam, gubernationem, educationem, & maritagium dict. Eliz. to the said Tho. Leigh, after which the said Tho. Leigh by Indenture 14 Marcii 29 Eliz. granted and assigned the said custody, rule, government, education, and marriage, and all his interest therein, and the said Indenture, to Sir John Spencer, after which the said Sir John Spencer and Thomas Leigh, by their Indenture the 26. of August 20. Eliz. granted and assigned to the said John Hanmer the said custody, rule, government, education and marriage of the said Eliz. and all their interest in the same, and all the recited Indentures, by which last recited Indenture 29 August, the said John Hanmer covenanted with the said Leigh, that Thomas Hanmer Son an Heir apparent of the said John Hanmer, maritaret & in uxorem duceret dictam Elizabetham ad vel antequam dicta Eliz. & dictus Tho. Hanmer perimplerint suas seperatas ætates 14 annorum, si dicta Eliz. ad id condescendere & agre are vellet; and afterwards before the said Tho. Hanmer and the said Elizabeth, suas separates ætates 14. annorum perinpleviſſent, sc. 8. die Sept. 20 Eliz. the said Tho. Hanmer took to wife the said Eliz. the said Tho. Hanmer then being ætatis 13. annorum and no more, and the said Eliz. then being of the age of nine yeares and no more, and Thomas Hanmer aforesaid overlived, &c. And pleaded further, that the said Tho. Hanmer after he attained his full age of fourteen yeares, and before any agreement or assent by the said Tho. Hanmer to the marriage aforesaid betwixt the said Tho. Hanmer and the said Eliz. had, et or after, idem Thomas Hanmer came to his age of fourteen yeares, scil. 10. die Sept. Anno 22 Eliz. ad dictum maritagium disagreavit, & maritagium illud renunciavit; and all this matter was pleaded in Barre, as performance of the Covenant contained in the Indenture of defeazance made upon the Recognizance, whereupon the Action is brought. And concluded his plea, unde petit judicium si dictus Tho. Leigh actionem suam predict. &c. Et quod ipse idem Johannes Hanmer restitutionem dict. 600 li. sc. ut præsert attachiat habere valeat. And all the question here was, if this marriage had by the manner, and afterwards renounced as aforesaid, be such a marriage as is intended in the Covenant, so as the said Covenant be satisfied by it.

it. And it was argued before the Mayor, Recorder, and Aldermen of London, in their Guild-Hall by Anger of Grays-Inne, on the part of Leigh the Plaintiff, and he in his Argument did much relye upon the definition of marriage, by Justinean in his Institutions. Nuptiæ maris & fæminæ conjunctio individua continens vitæ societatem; and the marriage here in question is not according to the said difinition, for the persons, parties to this contract, are not persons able by Law to make such contract, because that non attigerunt annos nubiles, Ergo nuptiæ esse non possunt, but only sponsalia, a step unto marriage; And there is also rendred one reason of the said definition upon the word individua, individuam dico quia non nisi morte aut divortio seperandam, but the marriage now in question might be dissolved without death or divorce, as it is in our case by disagreement: And see Jurisprudentiæ Romanæ, Lib. 1. Cap. 33. Societas & consortium omni vita inter marem & fæminam ad concubitum, which is societatis hujus consummatio: And as every Act doth consist upon three things, 1. Inceptio, 2. Progressio, 3. Continuatio, so is it in the Case of marriage; but in this case when Thomas Hanmer took the said Eliz. to Wife, that is but an inception, but the progression and consummation of it is cut off by the disagreement, and he much relyed upon the words of the Covenant, si dicta Eliz. ad id condescendere & agreare vellet, so as there is not any liberty left to the Defendant for the agreement or disagreement of the Son, but he ought to agree at the perill of his Father, but if Eliz. will not agree, then the Defendant is not at any mischeif, for in such case the Covenant doth not extend to him, and also here the Father is bound that his Son, a stranger to the Obligation should marry the said Elizabeth, which he ought to procure at his perill, or otherwise he shall forfeit his Bond: Egerton Solicitor of the Queen argued to the contrary; This marriage as much as concernes this Covenant, is to be considered according to the reason of the common Law, and not according to the rules and grounds of the Canon or Civil Law, not as a marriage in right, but as a marriage in possession, and marriage in possession is sufficient alwayes in personal things and causes, especially where the possession of the Wife is in question, but where the possession of the Husband is in question, there marriage in right ought to be, and where marriage in possession fals in averment, there it shall not be tryed by the Bishop, as in the Case of a marriage of right, where, never accompted in loyal matrimony, is pleaded, but by the Country, for in case of Wife in possession, never accompted in matrimony, is no Plea, but not his Wife, which see 12 E. 3. br. 481. A brought an Action of Trespasse against B, and C. B pleaded, that C is Wife of the Plaintiff, and demanded Judgement of the Writ, the Plaintiff by Replication said, never accounted in Lawfull matrimony, but it was not allowed, but was driven to say, not his Wife, for if C was the Wife of the Plaintiff in possession or by Reputation, it is sufficient to abate the Writ: see also 49. E. 3. 18. by Belknap, the right of the Espousall is alwayes to be tryed by the Bishop, but the possession of the marriage, not, as in Assize by A and K his Wife; the Tenant demanded Judgement of the Writ upon speciall matter, and concluded, so is the said K our Wife, and not the Wife of A, so in a cui invita by B and C his Wife, the Tenant pleaded, never accounted in loyall matrimony, the same is no answer to the Wife, for shee demanded in her own right, and if he who aliened was her Husband in possession, the Wife could not have other Action, for Assize doth not lye, because he was her Husband in fact at the said time in possession: And see also 50. E. 3. 20. adjudged according to the opinion of Belknap: And see also 39. E. 3. As to the marriage in right, as the case in question is, for upon such marriage, if the Husband be murdred before disagreement, the Wife shall have an Appeal of Murder, and a Writ of Dower: see where Appeal is brought of the Rape of his Wife, although shee be his Wife but in possession, and not in right, 11. H. 4. 13. by Hulls 168. and by Littleton, if the Wife be of the age, but of nine years, shee shall

shall have Dower, which see also 35. H. 6. and yet Dower shal never accrue but in case of marriage in right, for there never counted in marriage, is a good Plea, vi. 12. R. 2. Dower 54. In Dower the Tenant pleaded, that the Husband at the time of his death was but at the age of ten yeares, and the Demandant now but of eleven yeares, and yet Judgement was given for the Demandant, for by Charleton the same was a marriage in right untill disagreement, see 22. Eliz. Dyer 369. A woman at full age marryeth a Husband of twelve yeares, who dyeth before the age of consent, the same is a good marriage, and so ought to be certified by the Bishop, and 7. H. 6. 11. by Newton, a woman married within age of consent may post an Action as a feme sole, and the Writ did abate, Stamford Prerogat. 27. 19. E. 3. Judgement 123. In a Writ of Ward, the Jury found, that the Infant was of the age of ten years, and no more, but they did not know whether shee were married or not, but de bene esse, if he be marryed, assess damages one hundred pounds, and if not, five pounds upon which it appeareth that marriage at such an age is such a marriage upon which the Lord shal recover damages; See 13. H. 3. gard. 148. such marriage in the life of the Ancestor, infra annos nubiles, if there be no disagreement shall bind the King: And after the death of the Ancestor, the heire shal remain in custodia Domini Regis, usq; ad ætatem ut consentiat, vel dissentiat, 45. E. 3. 16. In a Writ of Ward, the Infant was found of the age of twelve yeares, and the Jurors gave damages three hundred marks, if he were marryed, and 27. H. 6. gard. 118. & 47. E. 3. Br. Trespasse 420. and Fitz. Action upon the Statute 37. Trespasse, de muliere abducta cum bonis viri, where the Wife is within the age of consent: And if I be bounden unto another in an Obligation, upon condition to pay a sum of mony upon the marriage day of I S, now, if I S be marryed within the age of consent, I am bound to pay the mony the same day, although afterwards the parties do dissent, and the Wife of such a marriage shall be received in a Plea reall upon the default of her Husband, & the words, si dicta Eliz. ad id condiscendere & agreare vellet, are to be understood of an agreement at the time of the marriage, and here the time is limitted for the solemnization of the marriage, scil. at or before they shall have accomplished their severall ages of twenty one yeares, makes the matter clear; For it is in the election of Hanmer the Father, to procure this marriage, scil. that his Son shall take to Wife, the said Elizabeth, at which of the two times he will, scil. at or before, &c. to the marriage before, &c. is as effectual in respect of the performance of this condition, as if the marriage had been had after, and as the case is, the condition could not be better performed, for if the marriage had been stayed till after fourteen years, &c. although the marriage doth not ensue, yet the Obligation had been forfeited, and that the marriage be solemnized just at the age of both of fourteen yeares, was impossible, for Thomas Hanmer was the elder by two yeares, then the said Elizabeth, and therefore they ought to be marryed at such time which might stand with the condition, and the same is done accordingly: And as to that which hath been obiected, That now by disagreement the marriage is determined, we ought to observe that Hanmer was bounden for the performance of the Covenant, and that his son and heir apparent maritaret, & in uxorem duceret dictam Eliz ad vel ante, &c. which is executed accordingly, and he is not bounden for the continuance of the said marriage, but the continuance of the same ought to be left to the law, which giveth to the parties libertie to continue the marriage by agreement, or to dissolve it by disagreement; And therefore if I be bounden to you, that I S (who in truth is an Infant) shall leby a Fine before such a day, which is done accordingly, and afterwards the same is reversed by Error, yet notwithstanding the condition is performed, &c. And afterwards Judgement was given against the Plaintiff.

Pasch.

Pasch. 29. *Eliz.* in the Common Pleas.

LXVIII. *The Earl of* Warwick *and the Lord* Barkleys *Case.*

AMbrose Earl of Warwick and Robert Earl of Leicester brought a Writ of Partition against the Lord Barkley, in which the parties pleaded to issue. And now at the day of the Enquest the Defendant did challenge, that in the whole Pannel there were but two Hundreders, and at the first it was doubted by the Court, if upon the Statute of 27 Eliz. cap. 6. by which it is Enacted, That no further challenge for the hundred shall be admitted if two sufficient Hundreders do appear, the Enquest shall be taken: But at length the whole Court was clear of opinion, that the said Statute did extend but to personal Actions; but this Action of Partition is a real Action; and summons, and severance lieth in it, but not processe of outlawry, and therefore here four Hundreders ought to be returned; so in an Action of Waste, although it be in the personalty: and therefore the Councel of the Plaintiffs prayed a Tales. Partition. Challenge.

Pasch. 29. *Eliz.* in the Common Pleas.

LXIX. *The Archbishop of* York *and* Mortons *Case.*

THe Archbishop of York recovered in an Assize of Novel disseisin against one Morton before the Justices of Assize; upon which Judgement Morton brought a Writ of Error before the Justices of the Common Pleas, and after many motions at the barre, it was adjudged that a Writ of Error upon the said Judgement did not lie in the said Court. 18 Eliz. Dyer 250. F B 22. That upon Erronious Judgement given in the Kings Bench in Ireland, Error shall be brought in the Kings Bench in England, 15 E 3. Error 72. Fenner who was of Councel with the Archbishop demanded of the Court how, and in what manner the Record shall be remanded to the Justices of Assize, so as the Arch-Bishop might have execution; To which the Court said, that the surest way is to have a certiorare out of the Chancery into the Common Pleas directed to the Judges there; and then out of the Chancery by Mittimus to the Justices of Assize. But Fenner made a difficulty of it to take such course for the remanding of it, for doubt they would not allow it to be a Record where it is not a Record, for upon the matter the Record is not removed, but remains with the Justices of Assize. Then Anderson said, Sue Execution out of the said Record; but because the Record came before us by Writ of Error, it shall be also removed and remanded by Writ: and so it was. Error upon recovery in Assize.

Pasch. 29. *Eliz.* In the Common Pleas.

LXX. Kempe *and* Carters *Case.*

THomas Kempe brought Trespasse for breaking of his Close against Carter: and upon pleading they were at issue, if the Lord of the Mannor aforesaid granted the said Lands per copiam rotulorum curiæ manerii predict. secundum consuetudinem manerii predict. and it was given in Evidence, that within the said Mannor were divers customary Lands, and that the Lord now of late at his Court of the said Mannor granted the Land, &c. per copiam rotulorum Copyhold.

rulorum curiæ, where it was never granted by copy before: It was now holden by the whole Court, that the Jury are bound to find, Dominus non concessit, for notwithstanding that de facto Dominus concessit per copiam rotulorum curiæ, yet, non concessit secundum consuetudinem manerii predict. for the said Land was not customary, nor was it demiseable, for the custome had not taken hold of it. In the same Case it was also shewed, that within the said Mannor some customary Lands are demiseabe for life only, and some in Fee; And it was said to that by the Lord Anderson, that he who will give in Evidence these several customs, ought to shew the several limits in which the several customs are severally running, as that the Mannor extends into two towns, and that the Lands in one of the said Towns are grantable for lives only, and the Lands in the other in Fee, and he ought not to shew the several customes promiscuè valere through the whole Mannor: And he remembred a Case of his own experience: scil. The Mannor of Wadhurst in the County of Sussex consisted of two sorts of Copy-hold, scil. Sook-land and Bond-land, and by several customs dissoverable in several manners: as if a man be first admitted to Sock-land, and afterwards to Bond-land, and dyeth seised of both, his Heir shall inherit both; but if he be first admitted to Bond-land, & afterward to Sook-land, and of them dyeth seised, his youngest Son shall inherit, and if of both simul & semel, his eldest Son shall inherit; But if he dyeth seised of Bond-land only, it shall descend to the youngest: and if customary Land hath been of ancient time grantable in Fee, and now of late time for the space of forty yeares hath granted the same for life only; yet the Lord may if he please resort to his ancient custom and grant it in fee. It was also moved in this case, If customary Land within a Mannor hath been grantable in Fee, if now the same Escheat to the Lord, and he grant the same to another for life; the same was holden a good grant, and warrantable by the custom, and should bind the Lord, for the custom which enables him to grant in Fee shall enable him to grant for life; and after the death of the Tenant for life, the Lord may grant the same again in fee, for the grant for life was not any interruption of the custom, &c. which was granted by the whole Court.

Evidence of customs.

Pasch. 29. *Eliz.* in the Common Pleas.

LXXI. Walker *and* Nevils *Case.*

Dower.

WAlker and his Wife brought a Writ of Dower against Jervice Nevil, and judgement was given upon Nihil dicit, and because the first Husband of the Wife dyed seised, a Writ of Enquiry of Damages was awarded, by which it was found, that the Land which she ought to have in Dower, the third part was of the value of eight pounds per annum, and that eight yeares elapserunt a die morti viri sui proximè ante inquisitionem & assessant damna to eight pounds, and it appeared upon the Record, that after Judgment in the Writ of Dower aforesaid the Demandents had execution upon habere facias sesinam, so as it appeareth upon the whole Record put together, that damages are assessed for eight years, where the Demandants have been seised for part of the said eight years, upon which the Tenant brought a Writ of Error, and assigned for Error, because damages are assessed untill the time of the Inquisition, where they ought to be, but to the time of the Judgement; but the Exception was not allowed; Another Error was assigned, because that where it is found, that the Land was of the value of eight pounds per annum, they have assessed damages for eight years, to eighty pounds, beyond the Revenue; for according to the rate and value found by verdict it did amount but to sixty four pounds: but that Error was not also allowed; for it may be, that by the long detaining of the Dower, the Demandants have sustained more damages then the

Damages.

the

bare Revenue,&c. Another Erroꝛ was aſſigned, becauſe Damages are aſſeſſed foꝛ the whole eight yeares after the death of the Husband, where it appeareth, that foꝛ part of the ſaid years, the Demandants were ſeiſed of the Lands by foꝛce of the Judgement and execution in the Wꝛit of Dower; and upon that matter the wꝛit of Erroꝛ was allowed.

Paſch. 29. *Eliz.* in the Common Pleas.

LXXII. Archpoole *againſt the Inhabitants of* Everingham.

IN an Action upon the Statute of Wincheſter of Huy and Cry by Archpoole againſt the Inhabitants of the Hundꝛed of Everingham, the Jury found, that the Plaintiff was robbed 2 Januarii poſt occaſum ſolis, ſed per lucem diurnam, and that after the Robbery committed, the Plaintiff went to the Town of Andover, and advertiſed the Baylies of the ſaid Town of the ſaid Robbery; and further found, that the ſaid Town of Andover is not within the ſaid Hundꝛed of Everingham, and that there is another Town nearer to the place where, &c. the Robbery was done, then the ſaid Town of Andover within the ſaid Hundꝛed, but the ſaid Town of Andover was the neareſt place where, &c. by the Kings high-way: It was moved that upon this matter, that the Plaintiff ſhould not have Judgement, foꝛ that he hath not made his freſh ſute accoꝛding to the Law, foꝛ he ought to have begun his Freſh-ſute within the Hundꝛed where the Robbery was done: and it was alſo objected, that the Robbery was done poſt occaſum ſolis, in which Caſe the Hundꝛeders are not to purſue the Malefactoꝛs. And Walmſey Serjeant cited a Caſe out of Bracton: Si appellatus ſe defenderit contra appellantem tota die uſque ad horam in qua Stellæ incipiunt apparere, recedat quietus de appello, and it is not reaſon to dꝛive the Hundꝛeders to follow tellons at ſuch a time, when foꝛ want of light they cannot ſee them. And all the Juſtices were clear of opinion, that if the Robbery was done in the night time, the Inhabitants are not bound to make the purſuit: And by Rhodes, if in a Præcipe quod reddat of Lands, the Sheriff ſummons the Demandant upon the Land in the time of night, ſuch a ſummons is meerly void.

Paſch. 29. *Eliz.* in the Common Pleas *Intrat. Trin.* 28. *Rot.* 1458.

LXXIII. Wiſeman *and* Wiſemans *Caſe.*

IN an Action of Debt by Wiſeman againſt Wiſeman, the Caſe was, that one Wiſeman was ſeiſed of the Lands, and by his Will deviſed, 1. I will and bequeath unto my Wife B. acre foꝛ the Term of her life, the remainder to my Son Thomas in tail: Item I will and bequeath unto my Son Thomas, all my Lands in D, and alſo my Lands in S, and alſo my Lands in V. Alſo I give and bequeath unto the ſaid Thomas my Son all that my Iſland oꝛ Land enclоſed with water which I purchaſed of the Earl of Eſſex: To have and hold all the ſaid laſt befoꝛe deviſed pꝛemiſſes unto the ſaid Thomas my Son, and the Heirs of his body: The only matter was, If the Habendum ſhall extend to the Iſland only, in which Caſe Thomas ſhall have but foꝛ life in the Lands in D, S, and V, oꝛ unto the Iſland, and alſo to the Lands in D, S, and V; in which Caſe he ſhall have Fee-tayl in the whole. And it was argued by Fenner, that the Habendum ſhould extend to the Iſland only; as he ſaid, the opinion of the Juſtices of this Court was in 4. Eliz. in another Caſe. I deviſe my Manoꝛ to D my eldeſt Son, and alſo my Land in S in tayl, in that Caſe the entail limitted foꝛ the Land in S ſhall not extend to the

Debt.

Deviſes.

said Manno, and of such opinion was Weston, Welch, and Dyer; Brown contra, that the Son hath in tayl in both. But if the words of the devise had been, I devise my Manno of D and my Lands in S to my Son in tayl, here the Son had an estate tayl in both. So it hath been adjudged, that if I devise Lands to A, B, and C, successively as they be named, the same is good by way of Remainder: Walmesley contrary, and he relyed much upon this, that the words of the Habendum are in the plural number. All the last before devised premisses, whereas the thing lately devised by the Will was an Island in the singular number, which cannot satisfie the Habendum, which is in the plural number, and therefore to verifie the plural number in the Habendum, the Habendum by fit construction shall extend to all the Lands in D, S, and V: and so upon his motion made at another day, it was resolved by all the Justices, that the Habendum should extend to all the said Lands, and the Habendum should not streighten the Devise to the Island only.

Extent of an *Habendum*.

Pasch. 29. *Eliz.* in the Common Pleas.

LXXIV. Fullwood *and* Fullwoods *Case.*

In an Action upon the Case, the Defendant put in bail to the Court to answer to the Action; and now Judgement being given against him, he came into Court and rendred himself, and prayed, that in discharge of his sureties, that the Court would record the rendring of himself, which was granted: And the Court demanded of the Plaintiff, if he would pray execution for the body against the Defendant, who said, he would not, whereupon the Court awarded, that the sureties should be discharged; and the Rule was entred, that the Defendant offered himself in discharge of his sureties, and Attornatus Querentis allocutus per curiam, &c. dixit se nolle, &c. Ideo consideratum fuit per curiam, quod tam prædict. defend. quam prædict. Manucaptores de recognitione prædict. & denariis in eadem contentis exoneretur.

Bail renders himself in court.

Pasch. 29. *Eliz.* in the Common Pleas.

LXXV. *The Parson of* Facknams *Case.*

The Parson of great Facknam brought an Action of Trespasse against the Parson of Hannington, and the Case was, If the Parson of one Parish claim by prescription a portion of Tythes out of the Parish of another, if the

Tythes, and where the spiritual court shall have jurisdiction of them.

the Spiritual Court shall have the Jurisdiction, for the tryal of it: And the opinion of the whole Court was clear, that it should, because that the matter is betwixt two spiritual persons, and concerning the right of Tythes. As 35. H 6. 39. I Miccar of B brought Trespasse for taking away of forty loads of Beanes, &c. The Defendant pleaded, that he is Parson of the said Church of B, and the Plaintiff is Miccar, &c. and before the Trespasse, &c. the Beans were growing in the same Town, and severed from the nine parts, and he took them as belonging to his said Church, and demanded Judgment of the Court, &c, The Plaintiff said, that he and all his Predecessors Miccars, &c. time out of mind, &c. have used to have the Tythes of such a Close, &c. belonging to his Miccaridge, and within the said Close the Beanes were growing, and were parcel of his endowment; and that at the time of the taking they were severed from the nine parts: whereupon he took them. And it was holden by Ashton and Danby, because it is confessed on both sides that the Beanes whereof, &c. were Tythes, the Right of which would come in debate betwixt the Parson and the Miccar, and both are spiritual persons, that the tryal thereof doth belong to the Spiritual Court. See 6 E 4. 3. 22 E 4. 23. 24. in such a matter betwixt Parson and Miccar there the Temporal Court was ousted of the Jurisdiction. See also 31 H 6. 11. betwixt the Parson and the Servant of another Parson. 7 H 4. 102. In Trespasse by a Parson against a Lay-man, who said, that one A is Parson of a Church in a Town adjoyning to a Town where the Plaintiff is Parson, and that A let to him the Tythe, and demanded Judgement, &c. and pleaded to the Jurisdiction, and by Gascoigne, the Plaintiff may recover his Tythes in the Spirituall Court.

Pasch. 29. *Eliz.* in the Kings Bench.

LXXVII. Bunny *against* Wright *and* Stafford.

Leases within 1 Eliz. and 32. 7, 8. made by Bishops:

IN Trespasse the Case was this: Grindal Bishop of London leased parcel of the possessions of his Bishoprick for one and twenty yeares, and afterwards ousted the Lessee and leased unto another for three lives, rendring the ancient and accustomed Rent, which was confirmed by the Dean and Chapter. And afterwards Grindall is translated: Cook argued, That the Lease is warranted by the Statute of 1 Eliz. At the Common Law a Bishop might make an Alienation in Fee-simple being confirmed by the Dean and Chapter: But by 32 H 8. cap. 28. Bishops without Dean and Chapter, or their confirmation may make a Lease for one and twenty years, but with the confirmation of the Dean and Chapter may make a Lease for one thousand yeares. But by the Statue of 1 Eliz. the power of Bishops in that right is much abridged, for now with confirmation or without confirmation they cannot dispose of their possessions but for one and twenty years or three lives; and this Lease is in all points according to the Statute of 1 Eliz. for first it begins presently upon the making of it: Secondly, the ancient rent is reserved payable yearly during the term; for although here be an old Lease in esse, yet the Rent reserved upon the second Lease is payable during the second term. for payable is a word of power and not of action, as 1 H 4. 1. 2. 3. Lord, Mesne, and Tenant, the Mesne gives the Mesnalty in tail, rendring Rent, it is a good Rent, and well reserved, although here be not a present distresse; yet it may be the Tenancy will escheat, and then the Donor shall distrein for all the Arrearages: And so the Rent is payable by possibility. And 10 E 4. 4. A leaseth for years, and afterwards grants the Reversion to a stranger, if the Beasts of the stranger come upon the Lands during the term; A may distrein for the Arrearages incurred, and if he happen seisin, he shall have an

Assize during the continuance of the first term. And he cited a Case lately adjudged in the Exchequer. Lessor entred upon Lessee for years, and made a Feoffment rendring Rent with clause of Re-entry, the Lessee re-entred, claiming his Term, and afterwards during the said Term for years, the Rent reserved upon the Feoffment upon demand of it is behind: Now hath the Lessor regained the Reversion: And so a Rent may be demanded although not distreinable. And all that was affirmed by Egerton Sollicitor General: And see the words of the Statute of 32 H 8. cap. 28. Rent reserved yearly during the said Lease due and payable to the Lessor, &c. such Rent, &c. and yet by the said Statute, such Leases may be good, although there be a former interest for years in being, if the same shall be expired, surrendred, or ended within one year after the making of such new lease, and so not expressly payable in, rei veritate, annually during the Term.

Pasch. 29. *Eliz.* in thē Kings Bench.

LXXVIII. Bonefant *and Sir* Rich. Greenfeilds *Case.*

Sale of Lands by the Executors of the Devisor.

BOnefant brought Trespasse against Sir Rich. Greenfeild, and upon the generall issue, this special matter was found: Tremagrie was seised of a Mannor, whereof the place where, &c. was parcel, in his Demesne as of Fee, and by his Will devised the same to his four Executors, and further willed, that his said Executors should sell the same to Sir John Saintleger for the payment of his debts, if the said Sir John would pay for it one thousand one hundred pounds at such a day, and dyed, Sir John did not pay the money at the day. One of the Executors refused Administration of the Will, the other three entred into the Land and sold it to the Defendant for so much as it could be sold, and in convenient time. It was moved, that the sale was not good, for they have not their authorite as Executors, but as Devisees, and then when one refuseth, the other cannot sell by 21 H 3. Cestuy que use, Wils, that his Executors shall alien his Land, and dyeth, although the Executors refuse the Administration, yet they may alien the Land. 19 H 8. 11. 15 H 7. 12. Egerton Sollicitor argued, that the sale is good by the Common Law, and also by the Statute 49 E 3. 16, 17. Devise, that his Executors shall sell his Land, and dyeth, and one of the Executors dyeth, another refuseth, the third may sell well enough, and such sale is good. See Br. Devise 31. 30 H 8. 39 E 3. Br. Assize 356. And he put a difference where an Authority is given to many by one deed, there all ought to joyn; contrary, where the Authority is given by Will; And if all the Executors severally sell the Lands to several persons, such sale which is most beneficial for the Testator shall stand, and take effect: And here it is found by verdict, that one of the Executors, recusavit onus Testamenti, Ergo, he refused to take by the Devise, for it was devised unto him to the intent to sell; therefore if he refuseth to sell, he doth refuse to take, and so it is not necessary that he who refuseth joyn in the sale, and although we are not within the expresse words of the Statute, yet we are within the sense and meaning of it. And afterwards it was adjudged, that the Condition, for the manner of it, was good.

Pasch. 29 *Eliz.* In the Common Pleas.

LXXIX. Gamock, *and* Cliffs *Case.*

Ejectione firmæ.

EJectione firmæ was brought by Gamock against Cliffe of the Mannor of Hockley, in the County of Essex, and upon the evidence the case was: That

That the King and Queen, Philip and Mary, ſeiſed of the ſaid Mannor of Hockley, leaſed the ſame to Edmund Terrell for yeares, exceptis & Reſervat. groſſis arboribus ſuper præmiſſis creſcentibus & exiſtentibus; Proviſo, that if the ſaid Leſſee his Executors, or Aſſignes ſhall do any voluntary Waſt in any of the Premiſſes before demiſed, that then the ſaid demiſe ſhall be void and accounted none in Law, the ſaid King and Queen after that leaſe grant the Reverſion to the Lord Rich & his Heirs, the Leſſee cuts down certain great Trees, which at the time of the demiſe were not great, but little Trees, but after, tractu temporis, became great, at the time of the cutting down were great, upon whom the Lady Rich wife & Widow of the ſaid Lord Rich, being Tenant in Dower, the ſaid Mannor (inter alia) being aſſigned to her in Dower, did enter, for the condition broken: It was moved, If the exception did extend to the trees which at the time of the demiſe were but little trees, but afterwards at the time of the cutting of them down were become great; for if the exception do extend to ſuch Trees, then upon the matter they were not demiſed, and if ſo, then waſt cannot be aſſigned in the cutting down of them, and then by the cutting of them, the condition is not broken: But if the exception ſhall be conſtrued to extend to ſuch Trees only which were great, Tempore dimiſſionis, then thoſe Trees in which, &c. are demiſed, and by the cutting down of them, the condition is broken. And the Lord Anderſon was of opinion, that the exception did extend to Trees, which at any time, dimiſſionis predict. became great, although at the time of the demiſe they were but little, ſo as upon the matter, ſuch Trees were never demiſed, and ſo the condition doth not extend to them; otherwiſe it ſhould be if the words had been modo creſcentibus & exiſtentibus: Another matter was moved, becauſe if the Lady Rich, being Tenant in Dower, and ſo in by the Law, not by the party, and ſo not privy, nor as Aſſignee could enter for the condition broken: And the Court was clear of opinion, that becauſe, that the words of the condition are, Quando dimiſſio predict. erit vacua, &c. and no clauſe of re-entry is reſerved, ſo that privity is not requiſite, the Lady Rich, ſhall take advantage of the condition. 11 H. 17. Where the words of a Leaſe are, that upon the not going to Rome, that the Leaſe ſhall ceaſe, it was holden that the Grantee of the Reverſion by the common Law ſhould take advantage of ſuch a condition; contrary where the condition is conceived in words of re-entry, 21 H. 7. 12. It was moved further, that here is not any voluntary waſte in the Leſſee as to the condition, becauſe done by a ſtranger, and not by the Leſſee himſelfe, and for that the condition is not broken, only the Leſſee is ſubject unto an Action of Waſte; otherwiſe, if the Leſſee had expreſly commanded the Vendee to cut them down, or had given to him expreſſe authority: The ſale was, All his Woods growing, &c.

Conditions.

Where the Tenant in Dower ſhall take advantage of a condition.

Paſch. 29. *Eliz.* In the common Pleas.

LXXX. Gill *and* Harewoods *Caſe.*

GIll brought an Action upon the Caſe againſt Harewood, and declared, that where the Defendant was endebted to the Plaintiff in ſuch a ſum, and ſhewed how; the Defendant in conſideration that the Plaintiff, per parum tempus deferret diem ſolutionis, &c. did promiſe to pay, &c. And, upon Non Aſſumpſit pleaded, it was found for the Plaintiff, and it was moved in arreſt of Iudgement, that here is not any conſideration, for no time is limited for the forbearance, but generally, parum tempus, which cannot be any commodity to the Defendant, for the ſame may be, but punctum temporis, &c. But the exception was not allowed, for the Debt in it ſelfe is a ſufficient conſideration.

Aſſumpſit.

Paſch.

LXXXI. *Paſch.* 29. *Eliz.* In the common Pleas.

FEnner Serjeant would have drawn a Fine which was by Dedimus Poteſtatem, and the Fine was to two, and their heires, but the Court would not receive ſuch Fine for the incertainty of the Inheritance, which alwayes in caſe of Fine ought to be repoſed in a perſon certain, and not left to uncertainty of the Survivor, & the ſaid Serjeant prayed preſently, that the ſaid Fine be received at the perill of the Conuſees, but the ſame was denyed him by the whole Court.

Mich. 29. and 30. *Eliz.* In *Communi. Banco.*

LXXXII. Maſcals *Caſe.*

Covenant.

MAſcall leaſed a Houſe to A for yeares by Indenture, by which A covenanted with Maſcall to repaire the Houſe Leaſed, and that it ſhould be lawful for Maſcall his Heires and Aſſignes to enter into the Houſe to ſee in what plight for matter of Reparation the ſaid Houſe ſtood, and if upon any ſuch view, any default ſhould be found in the not repairing of it, and thereof warning be given to A, his Executors, &c. Then within four moneths after ſuch warning, ſuch default ſhould be amended: the Houſe in the default of the Leſſee became ruynous: Maſcall granted the Reverſion over in Fee to one Carre, who upon view of the Houſe gave warning to A of the default, &c. which is not repayred, upon which Carre, as Aſſignee of Maſcall, brought an Action of Covenant againſt A, It was moved by Fenner Serjeant, that the Action did not lye, becauſe, the Houſe became ruynous before his intereſt in the Reverſion; But the opinion of the whole Court was againſt him, for that the Action is not conceived upon the ruynous eſtate of the Houſe, or for the committing of Waſte, but for the not repayring of it within the time appointed by the Covenant, after the warning, ſo as it is not materiall within what time the Houſe became ruynous, but within what time the warning was given, and the default of the Reparation did happen.

LXXXIII. *Mich* 29 & 30. *Eliz.* In *Communi Banco.*

Dower.

IN a Writ of Dower, brought by a Woman of the third part of certaine Lands, &c. The Tenant pleaded; That the Lands of which Dower is demanded, are of the nature of Gavel-kind, and that the cuſtome of ſuch Land is, that Dower ought to be demanded of the moyety of it, and not of the third part, upon which the Demandant did demur: And the opinion of Windham and Anderſon Juſtices was; That ſuch a Woman of ſuch Land might at her pleaſure demand her Dower either according to the Cuſtome, or according to the common Law; for by Anderſon, the common Law was before the Cuſtome, quod quære, and by Windham, if the Demandant here recover her Dower according to the common Law, yet if ſhee taketh another Husband, ſhee ſhall loſe her Dower as if ſhee had been endowed according to the Cuſtome, Coke, an Apprentice of the Inner Temple being at the Bar, when this Caſe was moved ſaid unto Serjeant Shutleworth, that the Caſe had been adjudged againſt the Demandant, and Scot Preignothory did affirme, that the Lord Dyer was of opinion, that the Woman ought to be endowed according to the Cuſtome, and not otherwiſe, And Sayer one of the Clarks of Nelſon, cheife

cheife Prejgnothory said, that it was adjudged accordingly, 16. Eliz. and that the Case was betwixt Gelbrand Demandant, and Hunt Tenant.

Mich. 29. *Eliz.* in the Common Pleas.

LXXXIV. Beverlie *and* Cornwals *Case.*

Quare Imped.

Out-lawry pleaded.

BEverlie brought a Quare Impedit against Cornwall, and had Judgement to recover upon a Demurrer in Law: Which see Mich. 28. and 29. Eliz. And now the Queen brought a Scire facias upon the matter. That the said Beverly after the said Judgement was out-lawed in an Action of Trespasse at the sute of I S, and upon that a Scire facias issued, ad respondendum Quare dicta Domina Regina, should not have execution of the Judgement aforesaid, by reason of the Out-lawry aforesaid; and declared in all as aforesaid: And further, that the said Cornwall had resigned. Upon which Beverlie did demurre in Law. And this Term it was argued by Puckering Serjeant for the Queen, that by that Out-lawry the Interest to present is transferred to the Queen. Which see 5 H 5. 3. Tenant at will of a Manor, to which an Advowson is appendant is out-lawed in an Action of Trespasse; the Church voided; by award of the Court it belongs to the King to present: And see 8 R 2 scil. Quare Imped. 200. A seised of an Advowson, the Church becomes void. A is out-lawed in a personal Action; the King shall have a Quare Impedit in that Case. And as to the Exception taken, because the Out-lawry is not sufficiently layed in the Writ, but only generally, viz. ut lagatus in Com. Lincoln, ad sectan. J S in plito transgressionis, without shewing the Out-lawry at large, there is a difference, where an Out-lawry is pleaded by way of barre, and disability of the person, &c. and where it is set down in a Writ, for a Writ ought shortly and compendiously to comprehend the cause of the Action, especially judicial Writs which are not tyed to any form certain, especially because that the Out-lawry set forth in the Writ is a Record of the same Court: For the perclose of the Scire facias is, pro ut per recordam hic in curia plenius apparet: And that Record being in the Court, the party cannot plead, Nul tiel record, as if the Record had been in any other Court: But he ought to demand Dyer of of the Record: Which vide 5 H 7. 24. Walmesley Serjeant contrary. By Out-lawry in an Action personal, the King cannot seise Land, but only take the profits of it, 9 H 6. 20. 21 H 7. 7. And as our case is, nothing doth accrew to the Queen by this Out-lawry, for the Queen her self is seised of the Advowson, because she, usurpando presentavit, and her Clark admitted; and although Beverlie hath recovered in a Quare Impedit against the Presentee of the Queen; yet because he is not removed by a Writ to the Bishop, the Queen continues Patron, and nothing remains in Beverlie, that may be forfeited; But Rhodes and Periam contrary, for by Periam if after such Recovery the Incumbent dyeth, the Patron shall present, for by the Judgement in the Quare Impedit for Beverlie, the Patronage is revested in him without any other execution: And by Rhodes, if after such Judgement the Patron dyeth, his Executors shall have a Writ to the Bishop. And by Walmesley, the Scire facias doth not lie for the Queen; for that Writ alwayes runs in privity of the Record upon which it is grounded, to which Record the Queen is a stranger, and by Out-lawry in an Action personal no Action real shall escheat, and therefore this Scire facias being in the nature of a Quare Impedit upon which it is grounded, which is a real Action, or at least a mixt shall not be forfeited; and also it shall be absurd to grant now a Writ to the Bishop for the Queen; whereas Judgement was given against the Queen, as in our case it hath been. And in no Case the Judges shall respect the title of the Queen, being a stranger to the Writ: But where a title for the Queen doth appear

upon

upon the pleading, or otherwise within the Record, 11 H 4. 224. by Hankford. If a clear title for the King be confessed by the parties upon pleading, a Writ to the Bishop shall issue for the King; so if such matter appear in Evidence, &c. the Land in question is seisable into the Kings hands. See 9 H 7. 9. 16 H 7. 12. so 21 E 4. 3. by Choke and F N B 38. e. In a Quare Impedit betwixt two strangers if title doth appear to the Court for the King, a Writ to the Bishop shall issue forth for the King; but in our Case nothing is within the Record to intitle the Queen, but all the matter upon which a Writ to the Bishop is prayed for the Queen is out of the Record, and a foreign thing. And as to the Out-lawry, he conceived it is not sufficiently alledged; for he ought to have made mention of the Exigent and of all the proceeding upon it, and the Judgement of the Coronors, and for defect of that no title is given to the Queen; and of that opinion was the Lord Anderson, and that it ought to be set forth in the Writ in what Term the said Beverly was out-lawed, and the Number Roll also, so that if Beverlie had demanded Dyer of the Record, the Court might know it: And by Nelson cheif Prothonotary, the Term in which the Out-lawry was, ought to be comprised in the Scire facias. Vide Book Entries 485. where in a Quare Impedit for the Roy upon such a title, the King shewed in his Court, that A was seised of such an Advowson, and granted the next Avoidance to B, and that afterwards one C impleaded the said B in a Writ of Account in such a Court, where Nihil was returned upon the summons, upon which issued forth a Capias, upon which is returned, Non est inventus, &c. upon which an Exigent, upon which the Sheriff did return, quod ad com. tenet. &c. & ad iiii. comitat. tunc prox. præcecident. the said B exactus fuit, & non comparuit, & quia ad nullum eorundam comitat. aparuit, ut legatus fuit, and after the Church voided, and that by reason thereof it did belong to the King to present: vide ibid. 196. accordingly. And as to the Scire facias all the Judges agreed, that upon the matter the Writ lay well enough: And it is good discretion in the Court to grant such a Writ: And by Rhodes, If two Coparceners of an Advowson make composition to present by turns, and afterwards one of them dyeth, her Heir within age, and Ward to the King: The Church voideth, and the King is disturbed in his presentment, he shall have a Scire facias upon such composition, notwithstanding that he be a stranger to it: See F N B 34 H. And by all the Justices, if one recover in Debt upon a simple contract, and before execution the Plaintiff is out-lawed in an Action personal, the King shall sue execution: And see 37 H 6. 26. Where in Debt upon an Obligation it was surmised to the Court, that the Plaintiff was out-lawed: And the Kings Attorney prayed delivery of the Obligation, &c.

Mich. 29 and 30 *Eliz.* *In Communi Banco.*

LXXXV. Moile *and th Earle of* Warwicks *Case.*

Quare Imped. A Quare Impedit was brought by Walter Moile against Ambrose Earl of Warwick, and the Archbishop of Canterbury. And now came the Serjeants of the Queen, and shewed an Office, to entitle the Queen to have a Writ to the Bishop, containing such matter, viz. That one Guilford was seised of the Manor of D, to which the Advowson of the Church was appendant, and that Manor was holden in cheife by Knights service, and that Guilford and his Wife levyed a Fine thereof to the use of themselves for their lives, the remainder over in tail to their eldest Son, and that Guilford is dead, but who is his next Heir, ignorant: And it was shewed by the Councel of the other side, that the truth of the Case was, that the said Guilford was seised of the said Manor in the right of his Wife, and so levyed the Fine, in which Case the said conveyance is not within the

the Statute of 32 H 8. for it was for the advancement of the Husband, not of the Wife, which Anderson granted. Vide Dyer 19 Eliz. 354. Caverlies Case, but that is not in the Office: And it was moved at the Barre, that the Office is imperfect, because no Heir is found. But Anderson, the Office is sufficient for the King to seise, although it be insufficient for the Heir, &c. And it was agreed by the whole Court, that the Court ought not to receive the Office, although one would affirm upon oath, that it is the very Office, but it ought to be brought in under the Great Seal of England; and also the Court shall not receive it without a Writ; and yet Nelson Prejgnothory said, that the Statute of Huy and Cry of Winchester was brought into the Court without a Writ under the Great Seal, and that was out of the Tower: And in that Case also the Justices held, that if a Record be pleaded in the same Court where it abides, the other party against whom it is pleaded may plead, Nul tiel Record, as if the said Record had been remaining in another Court, which all the Prejgnothories denyed, and that allwayes it had been used to the contrary. At another day the Case was moved again. The Plaintiff in the Quare Impedit counted, that Richard Guilford was seised of the said Manor, &c. in the right of Bennet his Wife, and so seised, they both levyed a Fine thereof to a stranger, Sur Conusans de droit come ceo, who rendred it to the Husband and Wife for their lives, the remainder to the Heires of the body of the Husband, the remainder to the right Heires of the Husband; and they so being seised, the Husband alone levyed a Fine to a stranger, Sur Conusans de droit come ceo, &c. and by the same Fine the Conusee rendred to the Husband and Wife in tail, the remainder to the Heires of the body of the Husband, the remainder to the right Heirs of the Husband, the Husband dyed seised, the Wife entred and leased the said Manor to the Plaintiff, and then the Church did become void: And now the Queens Serjeants came and shewed unto the Court an Office, which came in by Mittimus: In which Writ the perclose is, Mandamus vobis quod inspectis, &c. pro nobis fieri faciatis quod solum leges & consuetudinem Regni nostri Angliæ faciend. Statuetis; And the Office did purport, that the said Richard was seised of the said Manor, and held the same of the Queen, as of her Castle of Dover, by Knights service in cheif, and levied the Fine, ut supra, and that the said Richard dyed, sed quis sit propinquior hæres dict. Ric. penitus ignorant; and upon that Office prayed a Writ to the Bishop for the Queen: And two Exceptions were taken to the Office, First because it is not found by the said Office that the said Richard dyed seised, in which Case it may be for any thing that appeareth in the Office, that the said Richard after the said Fine had conveyed his estate in the said Lands unto others, or that he was disseised, &c. See 3 H 6. 5. If it be not found of what estate the Tenant of the King dyed seised, the Office is insufficient. But see there by Martin, that such an Office is good enough for the King, but not for the Heir to sue his Livery upon it. And by Anderson, Periam, and Rhodes, that defect in the Office is supplyed by the Count, for there it is expressly alledged, that the said Richard dyed seised. Secondly, because no Heir is found by the said Office. To which it was said by the Lord Anderson, that peradventure at the Common Law the same had been a material Exception. But we ought to respect the Statutes of 32 and 34 H 8. of Wils. And therefore as to the Wife the Queen is entitled to Primer seisin, because the conveyance was made for her advancement: And by Windham, the Queen in this Case shall not have Primer seisin, for by the Statute the Queen shall not have Primer seisin, but in such Case, where, if no conveyance had been made, the Queen should have had Primer seisin, but in this Case for any thing that appears before us, if this conveyance had not been made the Queen should not have had Primer seisin, forasmuch as no Heir is found, & if he dyed without Heir there is no Primer seisin, because there is not any in rerum natura to sue livery. Rhodes, Periam

Office trove.

A Record not to be brought into Court without a Writ.

and Anderson contrary; Admitting that Richard dyed without Heir, the Queen shall have Primer seisin against the Wife of Richard, notwithstanding the escheat. Walmesley Serjeant, If the Tenant of the King by Knights service in cheife dyeth seised of other Lands holden of a common person by Knights service, without Heirs, the King shall not have Primer seisin of such Lands holden of a Subject, which Windham granted: But by Anderson the Lord is put to sue an Ouster le mayne of the Land holden of him. And afterward Exception was taken to the Count, because the Plaintiff hath not averred the life of the Tenant in tail, that is, of Bennet the Wife of Richard, to whom the Land was entailed by the second Fine: But that Exception was disallowed by the whole Court, and a difference put by Anderson. Where a man pleads the grant of an Advowson in grosse by Tennant in tail, in such case the life of the Tennant in tail ought to be averred, for by his death the grant ceaseth. But where a man pleads the lease of Tenant in tail of a Manor with an Advowson appendant, in such case such averment is not necessary: So accordingly Smith and Stapletons Case, 15 Eliz. 431. And here it was moved, if, in as much as by the first Fine an estate for life was rendred to the Wife, and by the second Fine, in which she did not joyn, an estate tail was limitted unto her, and now when the Husband dyeth if he shall be remitted to her estate for life, which Windham granted, for that was her lawful estate, and the second estate tortious: But by Rhodes, Periam, and Anderson the Wife is at liberty to make her election which of the two estates she will have. And as to the Writ to the Bishop for the Queen, the Court was clear of opinion, that it ought not to be granted upon this matter: But all the question was, if Regina inconsulta, the Court would or ought to proceed: And it was holden clearly by the whole Court, that the tenure alledged, modo & forma, could not be a tenure in cheif, for it is said, that the Land was holden of the King, as of the Castle of Dover, in Capite.

LXXXVI. *Mich.* 29. and 30. *Eliz. In Communi Banco, Intr. Pasc.* 28. *Eliz. Rot.* 602.

Waste. WAst was brought by F and his Wife against Pepy, and counted, that the said Pepy was seised, and enfeoffed certain persons to the use of himself for life, and afterwards to the use of the Wife of the Plaintiff and her Heires. The Defendant pleaded, that the said Feoffment was unto the use of himself and his Heirs in Fee, &c. without that, that it was to the uses in the Count; Upon which they were at issue: And it was found by verdict, that the said Feoffment was unto the uses contained in the Count: But the Jury further found, that the estate of the Defendant by the limitation of the use was priviledged with the impunity for Wast, that is to say, without impeachment of Wast. And it was moved, if upon this verdict the Plaintiff shall have Judgement: And Anderson and Rhodes Justices, he shall, for the matter in issue is found for the Plaintiff, and that is the Feoffment to the uses conteined in the Count; and this impunity of Wast is a forrein matter not within the charge of the Jury, and therefore the traverse of it but matter of surplusage. As if I plead the Feoffment of I S. To which the other pleads, that he did not enfeoffe, and the Jury find a conditional Feoffment, the Court shall not respect the finding of the condition, for it was not in issue, and no advantage shall ever be had of such a liberty if it be not pleaded. 30 H 8. Dyer 41. In Dower the Tenant pleaded, Ne unquam seisi que Dower; the Tenant pleaded, that before the coverture of the Demandant, one A was seised of the Lands, of which Dower is demanded in tayl, who made a Feoffment to a stranger, and took the Demandant to Wife, and took back an estate in Fee, and dyed seised, having issue inheritable: Now although upon the truth of the matter she is not

not dowable de jure, yet when the parties are at issue upon a point certain, no foreign or strange matter not in question betwixt the parties shall be respected in the poynt of the Judgement. But if the Defendant had pleaded it in barre, he might have forclosed the Demandant of her Dower: Vide 38. H 6. 27. 47 E 3. 19. In a Præcipe quod reddat in the default of the Tenant one came and shewed how the Tenant who made default was but Tenant for life of the Lands in demand, the reversion in Fee to himself, and prayed to be received. The Demandant did counter-plead the receit, saying, the Defendant had fee, upon which issue was joyned. And it was found, that neither the tenant, nor he which prayed to be received, had any thing in the Land; In that case the Court did not regard the matter which was superfluous in the verdict, for they were at issue upon a point certain, that is, whether the Tenant was seised in Fee, for it was confessed of both sides, that he had an estate for life; and with that matter the Jury was not charged, and they are not to enquire of it, and so it was found against the Demandant, for which cause the Receit was granted. 7 H 6. 20. The parties were at issue upon a dying seised, which is found by verdict, but the Jury further find, that the other party made continual claim; this continual claim shall not be regarded in the point of the Judgement, because it was not pleaded in avoidance of the descent. Windh. Justice contrary: Forasmuch as it appeareth unto us upon the verdict, that the Plaintiff hath not cause of Action, and therefore he shall not have Judgement; As in Detinue, The Plaintiff counteth of a bailment by his own hand; the Defendant pleadeth, that he doth not detain, &c. the Jury find the Detinue, but upon a bailment by another hand: In this case, notwithstanding that the Detinue be found, yet the Plaintiff shall not have Judgement: But Rhodes, Periam, and Anderson in the principal case were of opinion, Judgement should be given for the Plaintiff, for in no case the party shall have advantage of such a Liberty of impunity of Wast, if he do not plead it; And the Jurors are not to meddle with any matter which is not in issue: And if it be but matter of surplusage, it is to no purpose. And afterwards Judgement was given for the Plaintiff.

No advantage of impunity for Wast shall be taken, where the same is not pleaded though found by verdict. Judgement.

Mich. 29. & 30. Eliz. In Communi Banco.

LXXXVII. Bracebridge & Baskerviles *Case.*

AN Action of Debt is brought against three Executors, one of them pleads in Bar a Recovery against himself in the Kings Bench: The other two plead plene administr. Against the first plea the Plaintiff did averre contra; and upon the second plea they are at issue: The first issue is found for the Plaintiff, and as to the other plea, it was found, that the Defendants have in their hands thirty pounds of the goods of their Testator not administred. Note, the debt in demand was one hundred pounds, upon which the Plaintiff had Judgement to recover the goods of the Testator, and thereupon had execution. Now the Plaintiff brought a Scire facias against the said Executors, supposing that many other goods of the Testator have come unto their hands after the Judgement, and prayed execution thereof: upon which the Defendant did demurre in Law. Vide 21 H 6. 40. 41. In debt against Executors of forty marks, the Defendant pleaded, that he had fully administred, and it was found, that the Defendant, at the day of the Writ brought, had of the goods of the dead twenty marks and no more, and gave damages five marks. There the Plaintiff had Judgement for the twenty marks of the goods of the dead, and the five marks of their own goods: And as to the other twenty marks, that the Plaintiff should be amerced: 33 H 6. 24. Where Executors plead, that they have nothing in their hands, which is found accordingly: After-

Debt against Executors.

wards goods of the Testator came to the hands of the Executors: Now the Plaintiff upon a surmise shall have out of the same Record a Scire facias to have execution of the said goods: But see 4 H 6. 4. contrary, for there it is said, that upon the matter the original is determined, and so no Record, upon which a Scire facias can be grounded: And see Fitzh. abridging the Case Scire facias, 25. by the verdict and the Judgement the Original is abated: Vide 7 E 4. 9. by Moile, according to 33 H 6. and to 46 E 3. 9. by Belknapp. And the Lord Anderson demanded of the Prejgnotharies the manner of the entry of the Judgements given in such Cases, who said, that their Entry is in this manner: (i. e.) Quod quereas recuperet, that which is expressly found by the verdict, but nothing of the residue, for of that no mention is made at all. And the Court seemed to be of opinion, that where, upon nothing remaining in their hands, pleaded, It is found that some part of the sum in demand is in the hands of the Executors; there the Plaintiff upon a surmise of goods come to the hands of the Executors shall have a Scire facias; contrary, where upon such issue, it is found fully for the Defendants, that they have nothing in their hands.

Scire facias, to have Execution of Assets come to Executors hands, after *ejus enter mynes* pleaded.

Mich. 29. and 30 *Eliz.* ***In Communi Banco.***

LXXXVIII. Fordleys *Case.*

POrdley brought debt upon an Obligation, the Condition was, that if the Defendant, viz. the Obligor deliver unto the Plaintiff the Obligee, at such a day and place, twenty pounds or ten Kine, at the then choice of the Obligee, &c. that then, &c. The Court was clear of opinion, that the Defendant in pleading the performance thereof ought to tender to the Plaintiff as well the twenty poonds as the ten Kine, and for default thereof Judgement was given against the Defendant. See the Number Roll T 29 Eliz. 1. part. 324. vide 14 E 4. 4. b.

Tender pleaded.

Mich. 29. and 30 *Eliz.* *In Communi Banco.*

LXXXIX. Barker *and* Pigotts *Case.*

EDward Barker brought Debt against Rich. Pigott Executor of the Will of E, Executrix of the Will of R, The Defendant pleaded, that he had fully administred the goods of his Testator E, upon which they were at issue, which was found for the Plaintiff. And it was moved in arrest of Judgement, that here is not any issue joyned, which answers to the Action, for the Action is brought against the Defendant in the quality of the Executor of an Executor, and the verdict extends to the Defendant, but is Executor of the said E, for it is found by it, that the Defendant hath fully administred the goods of his Testatrix, without any enquiry of the Administration of the goods of the first Testator R, in which capacity the Defendant is charged. So as here the Writ charges the Defendant in the quality of an Executor of an Executor and in respect of the first Testator, and the issue and verdict doth concern the last Testator: And the whole Court was clear of opinion, that although that now after verdict Fee-tail be saved, and no Judgement shall be given upon it, yet here the Court shall give Judgement as upon a Nihil dicit, in which case the Execution of the Judgement shall not fall upon the goods of the last Testator according to the verdict, but shall follow the nature of the Action which was brought against the Defendant as Executor of an Executor.

Debt.

Execution must follow the nature of the Action.

Mich.

Mich. 29 and 30. *Eliz. In Communi Banco.*

XC. Thacker *and* Elmers *Case.*

THacker recovered in an Assize of Novel disseisin against Elmer certain Lands in Hackney, and had execution: Elmer entred upon Thacker and ousted him, and Redisseised him. Thacker re-entred, and afterwards brought a Redisseisin; And it was moved, whether Thacker against his Entry might have a Redisseisin: And the opinion of the whole Court was, that he might well maintain the Writ, for he is not thereby to recover any Land; but the Defendant of that Redisseisin being convicted, shall be fined and imprisoned, and render double damages: Vide Book Entries 502. the Judgement in a Redisseisin is, Quod recuperet seisinam suam of the Land.

Re-disseisin, and the Judgment in it.

Mich. 29 and 30 *Eliz. In Communi Banco*

BIBL. CODR. COLL. OMN. ANIM. OXON.

XCI. Blaunchflower *and* Fryes *Case.*

BLaunchflower brought debt upon a Bond against Elinor Frye, as Executrix of one Andrew Frye her late Husband, who pleaded, that this Writ was brought 9. July, 27 Eliz. whereof she had notice the first of October after, within which time one Lawrence had brought an Original Writ against the said Elinor as Administratrix of the said Andrew: And after the bringing of the Writ, the Bishop of Bath and Wels committed Administration of the goods of the said Andrew to the said Elinor, which Elinor confessed the Action, upon which Judgement was given for the said Lawrence, beyond which she had not goods, upon which the new Plaintiff did demurre in Law. And by Anderson, the Recovery pleaded in barre shall not bind the Plaintiff, because it appeareth upon the plea of the Defendant, that the Administration was committed after the Writ purchased, which matter if the Defendant had pleaded, Lawrence could not have had Judgement to recover. As where there are three Executors, and debt is brought against two of them, if they do not plead that matter in abatement of the Writ, but plead, &c. or confesse the Action, so that the Plaintiff hath Judgment to Recover, that Recovery shall not bind a stranger who hath cause of Action against them, but that he may well satisfie it; and yet it was said that in such Case, the Defendant by the obtaining of the Letters of Administration had made the Writ good against her, vi. 13 H. 4. Fitz. Executors, 118. Administration committed before the Writ purchased shall abate the Writ brought against the Defendant as Executor, but such Administration obtained, depending the Writ, shall not abate it, vi. 21 H. 6. 8. 2 R. 3. 20. Another matter was moved by Anderson, because the Defendant had pleaded a Recovery by confession had against her without Averment that it was a true Debt, in which Case Covin is presumed, Windham and Periam were of opinion, that the matter of Covin ought to come in on the part of the Plaintiff, which Anderson denyed, vi. 9 E. 4. 13, 14. 33. the Cardinalls Case.

Debt.

Administration granted, pendant the Writ.

In *Communi Banco* Intrat. *Mich.* 26. & 27. *Eliz. Rot.* 12.

XCII. *Basset* and *Kernes* Case.

BAsset the Executor of Morris Sheppeard brought debt upon a Bond against Kerne, the Case was: That Kerne was bound to Morris in an Obligation upon

Debt by Executors.

upon Condition, that the ſaid Kerne ſhould pay to the ſaid Morris his Execu-
toꝛs, &c. at the choice and election of the ſaid Morris, within a moneth after
the death of the Lady Kerne, thirty pounds, oꝛ twenty Kine, to which the De-
Election. fendant pleaded that the Plaintiff within the moneth after the death, &c. did
not make any choice oꝛ election, upon which the Plaintiff did demur in Law:
And the Court was clear of opinion, that it was a good Plea in Barr, foꝛ the
Obligoꝛ is not bounden to make a tender of both, viz. of the mony and the
Kine; but the Obligee himſelfe is bounden at his perill to make election
within the time limited; As if I be bounden to you, to make unto you ſuch fur-
ther aſſurance within ſuch a time by Fine oꝛ Feoffment as you ſhall chooſe,
it behoveth you to make election of your aſſurance, Fine, oꝛ Feoffment, and
in the principall Caſe, the election of the Plaintiff ought to precede the ten-
der of the Defendant: vi. the Lord Liſles Caſe, 18 E 4. 15. 17. 20, 21 Where
the Defendant was bound to the ſaid Lord to ſhew his Evidences touching
ſuch a Houſe to the ſaid Lord oꝛ his Councill, the election was to the Defen-
dant to whom he would ſhew them; and there by Brian, if I be bound to you to
marry your Daughter, oꝛ to go to Yorke on your Buſineſſes upon requeſt be-
foꝛe you require me to marry your Daughter I may do it, oꝛ go to Yorke,
which Coke granted, vi. 13 E. 4. 4. Where the condition is in the diſjunctive,
beforꝛe the day of perforꝛmance the election is to the Defendant, but if at
the day he make default, the Election is to the Obligee; vi. 9 E. 4. 36, 37.
And by Windham, if I be bounden unto you in an Obligation of ten pounds, to
pay to you ſuch a day ten pounds in Gold, oꝛ Silver, if you do not make your
election beforꝛe the day, yet the duty remaines payable, foꝛ the thing to be paid
is parcell of the penalty, quod fuit conceſſum; And as to the principall Caſe,
the Court was clear of opinion, that upon this matter the Plaintiff ſhould be
barred: See beforꝛe this Terme, Forteleyes Caſe.

Mich. 29 & 30 *Eliz.* *In Communi Banco.*

XCIII Searches *Caſe.*

Habeas Cor-
pus. A Habeas Corpus iſſued forth out of the Court of Common Pleas, to the
Steward & Marſhall of the Houſe, &c. foꝛ one Wil. Search, which was re-
turned in this manner, viz. quod Domina Regina per litteras ſuas Patentes ſuſce-
pit, in protectionem ſuam regiam, Johannem Mabbe, and his ſureties, and of her
further grace by the ſaid Letters, voluit, that if any perſon ſhould arreſt, oꝛ
cauſe to be arreſted the ſaid John Mabbe oꝛ any of his ſureties, that then the
Marſhall of her Houſe, oꝛ his lawfull Deputy might arreſt every ſuch perſon,
and detaine them in Priſon untill ſuch perſon ſhould anſwer beforꝛe the Pri-
vy Councill foꝛ the contempt; And that the ſaid William Search cauſed one
John Preſton one of the ſaid ſureties of the ſaid John Mabbe to be arreſted, &c.
And upon that returne, the ſaid William Search was diſcharged; And alſo be-
cauſe that after the ſaid diſcharge the parties cauſed the ſaid William Search to
be arreſted againe foꝛ the ſame cauſe, that is by colour of the ſaid protection;
An Attachment was granted againſt them.

Note, that the ſame Terme, Mich. 29. and 30. Eliz. Another Habeas
Corpus was directed to the Steward and Marſhal of the Marſhalſey,
Habeas corpus foꝛ one Howell, who made returne, that the ſaid Howell was committed
to his cuſtody, per mandatum Franciſci Welſingham militis Principalis
Secretarij, & unius de privato concillio Dominæ Reginæ, and that returne
was by the Court holden inſufficient, becauſe the cauſe upon which he was
committed, was not ſet down in the returne; and therefoꝛe day was given to
amend

amend the returne, and now they returned the Writ in this manner, ſſ. infra nominatos Johannes Howell conceſſus fuit, &c. ex ſententia & mandato totius concillii privati Dominæ Reginæ; Ita quod corpus ejus habere non poſſumus, &c. And that returne was alſo holden by the Court to be inſufficient for (by whatſoever perſon, or by what meanes ſoever he was committed) the concluſion of the returne ought to be, Corpus tamen ejus paratum habeo, and if it ſhall ſeem good to the Court, that the Priſoner ſhall have his Priviledge, and ſhall be diſmis't, he ſhall be diſcharged, but if not, then he ſhall be remanded, and the Court took a difference, where one is committed by one of the Priby Councill, for in ſuch caſe the cauſe of the committing ought to be ſet down in the returne; But contrary where the party is committed by the whole Councill, there no cauſe need to be alleadged.

Mich. 29 and 30. *Eliz.* In *Communi. Banco.*

XCV. Bret *and* Audars *Caſe.*

BRet brought Debt upon an Obligation againſt Audar, the Condition of which Obligation was, that the Defendant ſhould ſtand to the Award, &c. And the Arbitrator awarded, that the Defendant ſhould pay unto the Plaintiff ten pounds, without naming day or place; And as to that the Defendant pleaded, that he was alwayes ready, and yet is, &c. without ſhewing any tender: And it was moved, That although that would have been a good Plea in debt upon an Arbitrament, as the Caſe is, 7 H. 4. 97. See 21 E. 4. 40, 41, 42. Yet now by the Obligation and the Condition of it, the ſum is payable in another manner then it was before, ſee the pleading of the Caſe, 21 E. 4. In Debt upon an Obligation to performe the Award; That the award was made between the Termes of Paſch. and Trinity, and he, the eighth of September after, tendred the twenty pounds, and the Plaintiff refuſed it. And the Lord Anderſon put a difference between the Caſe, in 22 H. 6. 57. And the Caſe at the Bar, for in our Caſe the Obligation doth precede the duty which accrueth by the Award ſubſequent, but in the former Caſe the duty did precede the Obligation which was made for the further aſſurance of the duty: And here the Defendant ought to have pleaded the tender, and ſee 14 E. 4. 4. A is bound unto B, that, where he hath granted to the ſaid B a Rent-charge out of ſuch Land, now if the ſaid B ſhall enjoy the ſaid Rent according to the forme and effect of the ſaid Grant, that then, &c. there he needs not to plead any tender, for the Rent is not payable in other manner then it was before, contrary if the Condition had been for the payment of the Annuity, And of that opinion was the whole Court, that he ought to have pleaded a tender. Another matter of the Award was, that the ſaid Audar ſhould yeild up, ſurrender, and relinquiſh to the Plaintiff all ſuch Houſes and Tenements which he had in his poſſeſſion, by reaſon of the cuſtody of the ſaid Plaintiff: As to that the Defendant pleaded, that he had yeilded up, &c. All ſuch Houſes, &c. generally without ſhewing which in certaine; And for that cauſe the Court was clear of opinion, that the Plea was not good; which ſee 9 E. 4. 16. If I be bounden upon condition to enfeoff the Obligee of all Lands, Tenements, which were to I S, in pleading the performance of that Condition, I ought to ſhew what Lands and Tenements in certain, for they paſſe out of me by the Feoffment; See alſo 12 H. 8. 7. 13 H. 8. 19. Another point of the Award was, That the ſaid Audar ſhould acquit and diſcharge, and ſave harmleſſe the Plaintiff of ſuch an Obligation, to which the Defendant pleaded, that Querens non fuit damnificatus, and that Plea was holden inſufficient, for he ought to have ſhewed, how he had diſcharged him, and it is not ſufficient to anſwer only to the damnification, as if I be bounden to convey unto you the Manor of

Debt upon a Bond to perform Award.

Tender.

Non damnificatus, generally, where no Plea.

of B, in pleading the performance of the condition. It is not sufficient to shew, that I have conveyed the said Manner, but to shew by what manner of conveyance, viz. by Fine, or Fesffment, &c. 22 E. 4. 43. If the condition be to discharge the Plaintiff, &c. then the manner of the discharge ought to be shewed, but if it be to save harmlesse only, then non damnificatus, generally is good enough, 40 E. 3. 20. 38 H 6. 39. The condition of an Obligation was, that the Obligor should keep without damage the Obligee, of such a sum of mony against B, to whom he was bounden for the payment of it, and the said Obligor pleaded, that at such a day, &c. the said B at his request delivered the Obligation to the Plaintiff in lieu of an acquittance, without that, that the Plaintiff was damnified by the said Obligation, before the delivery of it, and it was holden by the Court, that if the Defendant had pleaded, that he had kept the Plaintiff without damage, and had not shewed how, that the Plea had not been good, See 22 E. 4. 40 The Lord Lisles Case. And afterwards Judgement was given for the Plaintiff.

Mich. 29. and 30. *Eliz.*

XCVI. Heydons *Case.*

RAlph Heydon pretending title to certaine Land, entred into it, and made a Lease of it to try the title: Upon which his Lessee brought an Ejectione firmæ, in which the parties were at Issue; And now at the day of the Enquest, the Jurors were called, and but five of them appeared, whereupon, the Defendant came and shewed to the Court, that the said Heydon by his Freinds and Servants, had laboured the Jury, not to appear, and that for the further vexation of the Defendant who had foure Verdicts in affirmance of his title, and that the said Heydon to procure the Jury not to appear, had surmised to them, that he and the Defendant were in course of an agreement, whereas in truth no such communication of agreement had any time passed betwixt them: And all this was openly deposed in Court, as well upon the oath of the Defendant himselfe as upon the oath of one of the Jurors, upon which the Court awarded an Attachment against the said Heydon, to answer the contempt; And also granted to the Defendant, that he might sue a Decem tales with proviso, for his own expedition.

Mich. 29 and 30. *Eliz. In Communi Banco.*

XCVII. Smith *and* Kirfoots *Case.*

Debt upon Arbitrament.

SMith brought Debt upon an Arbitrament against Kirfoot, and declared that the Defendant and he, imposuerunt se in arbitrium, ordinationem, & judicium, Johannis Popham ar. arbitratoris indifferenter electi, de jure, titulo, & interesse in quibusdam Messuagijs, &c. Who taking upon him the burthen of the Arbitration, ordinavit, that the said Defendant should pay unto the Plaintiff ten pounds, in plenam satisfactionem, &c. and thereupon he brought his Action; It was moved by Walmesley Serjeant, that the Declaration is not sufficient, for it appeareth that the Arbitrament set forth in the Declaration is utterly void; because whereas ten pounds is awarded to the Plaintiff, nothing is awarded to the Defendant, and so the Award unequall, and so void. But the Court was clear of opinion, that notwithstanding that such an Arbitrament be void in Law, yet it may be for any thing that appeareth, that the award is good enough: For the Plaintiff is not to shew in his Declaration all the Award, but such part only of it which doth entitle him to the thing,

thing, &c. and if the Defendant wil impeach the Award for any thing, that is to come in on his part, vi. ac. Book Entries, 152. 123. vi. For the Arbitrament, 39 H. 6. 12. by Moile, 7 H. 6. 41.

Mich 29. & 30. *Eliz.* *In Communi Banco.*

XCVIII. Arundell *againſt* Morris.

RIchard Arundell ſued an Audita Querela againſt Morris, and it was comprehended in the Writ; That Morris had recovered againſt him a certaine Debt, and that he was taken by a Capias ad ſatisfaciendum, at the ſuit of the ſaid Morris, by Hickford Sheriff of the County of Glouceſter; who let him go at large, &c. And they were at iſſue, upon the voluntary eſcape, and it was found for the Plaintiff: It was objected in arreſt of Judgement, that the Writ of Audita Quærela is not good, for the words are, that the Plaintiff, captus fuit virtute brevis noſtri judicialis, whereas this word (judicialis) is not in the Regiſter; but only brevis noſtri de capiendo. But by the whole Court, the Writ is good, for the word (judicialis) is but a word of ſurpluſage, and ſhall not make void the Writ: And afterwards Judgement was given for the Plaintiff. Audita Querela.

Mich. 29 & 30. *Eliz.*

XCIX. Brook *againſt* King.

IN Debt upon an Obligation by Brook againſt King, the Defendant pleaded, that the Bond was endorced, with ſuch condition, viz. That if the ſaid Defendant King ſhall procure one I S to make reaſonable recompence to the Plaintiff for certaine Beaſts which he wrongfully took from the Plaintiff, that then, &c. And he ſaid in facto. That the ſaid I S had ſtolen the ſaid Beaſts from the Plaintiff, and thereof he was endicted, &c. and ſo the condition being againſt the Law, the Obligation was void, upon which the Plaintiff did demur in Law. And it was argued by the whole Court: That where the condition of an Obligation ſhall be ſaid againſt the Law, and therefore the Obligation void, the ſame ought to be intended where the Condition is expreſly againſt the Law in expreſſe words, and in terminis terminantibus, and not for matter out of the condition, as it is in this caſe; And Judgement was given for the Plaintiff. Debt. Conditions againſt Law.

Mich. 29. & 30. *Eliz.* *In Communi Banco.*

C. Hawks *againſt* Mollineux.

IN a Replevin by Hawks againſt Mollineux who avowed for Damage-feaſant; The Plaintiff in Bar of the Avowry, pleaded that Sir Gervaſe Piſton Knight, was ſeiſed of a Meſſuage and twenty Acres of Lands; And that alwayes thoſe whoſe eſtate, &c. have uſed to have Common in the place where, &c. for all their Cattell commonable in this manner, viz. If the ſaid Land be ſowed by aſſent of the Commoner, then no Common, until the Corne be mowed, and when the Corne is mowed, then Common untill the Land ſhall be ſowed againe by aſſent of the Commoners: And this Preſcription was found by Verdict, and exception was taken to this preſcription becauſe againſt common right, ſo as a man cannot ſow his Land without the leave of another. But the exception was diſallowed by the Court; for the preſcription was holden to be good by the whole Court, for by the Law of the Land, the Owner of the Land cannot plow the Land where another hath common; but here is a benefit to each party, as well for the Owner of the Land againſt the Commoner, as for the Commoner againſt the Tenant of the Land, for each of them hath a qualified Intereſt in the Land. Replevin. Preſcription.

Intr. Pasch. 29. *Eliz. Rot.* 1410. *In Communi Banco.*

C I. Baldwin *and* Cockes *Case.*

Replevin.

BAldwin was Plaintiff in a Replevin against Cockes, and upon the pleading the Case appeared to be this, That Sir Richard Wayneman was seised of the place where, &c. and leased the same to one Truepeny and one Eliz. Reade for term of one and twenty years, if the said Trupeny and Eliz. or any child or children betwixt them begotten should live so long, Elizabeth within the term dyed without issue; If now the term for one and twenty yeares be determined was the Question. And the Lord Anderson conceived, that the estate for yeares is not determined by the death of Elizabeth. And it was argued by Shutleworth Serjeant, that upon the matter the term is determined: And he put the Case of the Lord Bray, 3 Eliz. Dyer 190. Where the Lord Bray sold unto four great Lords the marriage of his Son and Heir, to the intent to be married at the appointment and nomination of the said Lords, the Lord Bray dyed, one of the said Lords before any marriage, or appointment, or nomination, dyed, the Son is married by the appointment, &c. of the surviving Lords; That marriage is not within the intent of the Covenant, and adjudged that upon that marriage no use should accrue. And also he cited this Case adjudeed in the Kings Bench. The administration is committed to one durante minore ætate of two Infants, one of them becomes of full age, the power of the Administration is determined, which Walmesley Serjeant granted, for it is but an authority; but here in the Case at Barre is a matter of interest. And by Anderson all the construction of this lease and grant rests upon this point, if this word (Or) either shall be taken as disjunctive as it is in its nature, or as a conjunctive, and if it be taken as a disjunctive, if it make the whole sentence in the disjunctive, as if the limitation had been, if the Husband or Wife or any Child, &c. And Fenner, put this Case out of 17 E 3. as he cited it. Land is given to I S in Fee so long as A B hath issue of his body. A B dyeth without issue, his Wife, privimen. ensient. Now the estate is determined, and upon birth of the issue after shall not revive, which Rhodes and Anderson denyed, for in many Cases the Law shall respect the existency of the child in the mothers belly: And see 7 Eliz. Plow. 289. where a Copulative shall be taken in the disjunctive, as a covenant with B to make a lease for years of such Lands to the said B and his Assignes, the same shall be construed, or his Assignes. And it was clearly agreed by the other parties, that if the words had been, If Truepeny, Elizabeth, or any child or children, &c. so long, &c. upon the death of any of them the interest is determined: And by Rhodes, Periam and Windham in the principal Case, the lease shall endure as long as any of the persons named in the Proviso shall live, and so seemed to be the meaning of the parties. And Anderson hæsitavit in the words of the limitation, i. the Habendum to the said Trupeny and Eliz. for one and twenty years a festo Sancti Johannis Baptist. post terminum annorum (the expiration of a former term) if the said Trupeny and Elizabeth, or any child, &c. And he conceived, that the limitation did go to the commencement of the lease only, and not to the expiration or determination, as if the lease should not begin if they all were not alive at the commencement of the lease: And all the other Justices were clear of the contrary opinion, for by them this limitation shall goe, and shall be referred to the determination of the Lease, and not to the commencement of it.

Exposition of words in deeds.

And by Anderson, if any cause should be, for which the lease should endure until the yeares be encurred, notwithstanding the death of the Husband or Wife, it was because the lease was intended a common advancement to both, for

for it should be in vain to name the Wife in the leaſe, if the leaſe ſhould ceaſe by the death of the Husband. And afterwards after many arguments on both ſides, it was adjudged, that by the death of Elizabeth, the leaſe was not determined, for the disjunctive, before (Child) makes all the limitation in the disjunctive.

Mich. 29. & 30. *Eliz. in Communi Banco.*

CII. Zouch *and* Bamfeilds *Caſe.*

THe Caſe between the Lord Zouch and Bamfeild was now argued by the Juſtices. And Rhodes the puiſne Juſtice argued, that the Lord Zouch the Demandant ſhould be barred; four Exceptions have been taken to the barre: Firſt, becauſe it is not ſhewed in the barre that the moyety of thoſe ſixty meſſuages, &c. of which he pleads the Fine, was parcel of the Manor at the time of the Fine levyed; for the pleading is, that the Grandfather of the Demandant was ſeiſed of the ſaid Manor, unde medietas prædictorum 60. meſſuagiorum, &c. a tempore cujus contrar. memoria, &c. was parcel, and ſo ſeiſed de manerio prædict. unde, &c. Finis ſe levavit; and he conceived that the pleading, notwithſtanding that was good enough; for he hath ſaid as much in effect, contrar. cujus memoria hominum non exiſtit, in the preſent tenſe, which amounts to this, that men cannot remember, &c. but that this moyety was parcel of the ſaid Manor: As 10 H 7. 12. In an Aſſize of common, the Plaintiff makes his title, that he was ſeiſed of a Meſſuage and carve of Land in D, to which the ſaid Common is appendant, and that he and all his Anceſtors, and all thoſe whoſe eſtate he hath, &c. have uſed to have Common, &c. Exception was taken to the title, becauſe the Plaintiff doth not ſhew in his title, that he is ſeiſed of a Meſſuage, &c. for if he hath aliened the Meſſuage, the Common paſſeth, ſo if he be diſſeiſed, &c. but the Exception was not allowed, for it appeareth upon the words of the title, that the Plaintiff is ſeiſed: i. all thoſe whoſe eſtate he hath in the preſent tenſe, which words do ſhew and declare poſſeſſion and ſeiſin in the Plaintiff, the time of the plea pleaded, ſo in this caſe, the ſubſtance of the words, in which the defect is aſſigned, is ut ſupra; That men cannot remember, but that this moyety was parcel of the Manor, and then the words after, unde, &c. reddidit Manerium prædict. unde &c. ſhall have the ſame conſtruction as before. Periam conceived, that the Barre is nought for the cauſe aforeſaid, for it is not ſo pleaded, that we can adjudge upon it, that the ſaid moyety was parcel of the Manor at the time of the Fine levyed, and then the Fine cannot extend unto it. And the reaſon alledged by my brother Rhodes ſhall not help that matter, for the ſaid words cannot be conſtrued otherwiſe, but that no man can remember but the ſaid moiety was parcel, but not that it is parcel, or at the time of the Fine levyed was parcell. Vide 32 H 6. 24. In Treſpaſſe, the Defendant pleaded, That A was ſeiſed of the Manor of D, whereof the place, &c. is parcel, he ought to ſay expreſly, that the place where was parcel of the Manor at the time of the treſpaſſe ſuppoſed: Windham conceived, that the plea was good, and that it appeareth well upon this plea, that the ſaid moyety was parcel of the ſaid Manor at the time of the Fine levyed, for he pleads, that the Grand-father of the Demandant was ſeiſed of the Manor of N; Unde medietas prædictorum, &c. a tempore cujus contrar. memoria hominum non exiſtit, & ſic ſeiſitus exiſtens, Finis ſe levavit; ſic ſeiſitus; i. e. ſeiſed of the Manor in ſuch ſort, as the Manor is ſet forth before, and that is good pleading, eſpecially by way of bar, which if it be good to a common intent, is well enough: and the word (unde, &c.) ſo often repeated after ſhall be idle and to no purpoſe if the Law ſhall not give ſuch a conſtruction. Anderſon to the ſame purpoſe. And he much

relyed upon the reason of Windham, and so seised. Another Exception was
Averrement. taken to the Barre, because in pleading of the Fine, it is not averred, that the Conusor at the time of the Fine levyed was of full age, out of prison, &c. And as to that Rhodes took the difference between the pleading upon the Statute of 1 H 3. where these disabilities are within the purview of the said Statute, and upon the Statute of 4 H 7. where in the body of the Statute no mention is made of them, but afterwards in an especial Exception by it self, and he cited the opinion of the Justices, especially of the Lord Dyer in the Case reported by Plowden. 5 Eliz. 365. betwixt Stowel and the Lord Zouch: Periam to the same intent, and upon the same reason, and further he said, that although the Statute of 32 H 8. contains in its purview the same disabilities; Yet this Fine is pleaded upon the Statute of 4 H 7. and therefore the pleading of the same shall not be directed nor waged by the Statute of 32 H 8. which doth not alter the pleading of a Fine which was before, nor the reason of it; for it is not properly a Statute, nor do Fines receive any strength or virtue by it, but is but a construction of the said former Statute. And he put the Case betwixt Hide and Umpton; where Umpton meane betwixt the Statutes of 32 and 34 H 8. Declared his Will of all his Lands, which devise if it be good for two parts of the Land devised it was doubted, or that the devise should be void for the whole, afterwards, came the Statute of 34 H 8. and cleared the doubt, for to that intent it was made, and in the said Statute there is a Proviso, that the said Statute shall not extend to the Will or the Devise of Tho. Umpton, or shall be prejudicial or hurtful to any person or persons for any Lands, &c. contained or specified in the said Will or Devise, but that the said Will and Devise shall stand, remain and be in the same case, in force and effect in the Law, as the same was before the making of this Act. Now, notwithstanding that Proviso, the Will of Umpton was holden good but for two parts, for so the Statute of 34 H 8. construed the Statute of 32 H 8. So in our Case, the Statute of 32 H 8. of Fines construes the Statute of 4 H 7. to extend to Fines levyed by Tenant in tail, therefore the estate tail shall be adjudged in Law to be bound by the Statue of 4 H 7. and not by 32 H 8. which is rather a Judgement upon the said Statute of 4 H 7. then any new Statute. Windham to the same intent, and he relyed upon the reason aforesaid. And further said, if one will plead a Lease made by Tenant in tayl upon the Statute of 32 H 8. he need not to aver the full age of the Lessor, and yet that quality of full age is within the purview of the said Statute. First, all Leases to be made, &c. by any person being of full age, &c. and so is the common use of pleadings. And of the same opinion was the Lord Anderson for the said Exception, for the reasons, and upon the difference aforesaid. Another Exception was taken to the Barre, because it is not alledged, that the said Fine was engrossed in the same Term in which it was levyed. And as to that, it was holden by Rhodes, that in pleading of a Fine it needs not to shew any engrossing of it; and so are many Presidents, vide Plowd. Com. Smith and Stapletons Case. 15 Eliz. 428. Where a Fine is pleaded, Quædam finalis concordia facta fuit in Octav. Sancti Hillarii 35 H 8. & postea a die Pasch. in quindecem diei 36 H 8. concessa & recordata, &c. Super quem finem proclam. secundum formam Statuti factæ fuer. viz. prima proclam. 7. Maii, Term. Pasch. 36 H 8. without any mention of the engrossing of it: And see the Case betwixt Stowel and the Lord Zouch, where the Fine is pleaded as it is pleaded in the Case at Barre, qui quidem finis in forma prædict. levatus (and that fine was levyed Pasch. 30 H 8.) ingrossatus fuit, & postea in Curiæ predict. secundum formam Statuti, &c. lectus, & proclamatus fuit, viz. prim proclam. Term. Pasch. 30 H 8. And so upon the matter it is sufficient to shew, that the Fine was engrossed the same term in which it was levyed, for the Fine is pleaded to be levyed Term. Pasch. qui quidem Finis ingrossatus fuit, & postea proclam. vid. l. prim. proclam. Termino Pasch. which was the same Term it was levyed: And so,

admit

admit, that in pleading it ought to be shewed that the Fine was ingrossed in the same Term in which it was levyed,&c. Now it appears here to us by necessary consequence, that the Fine was ingrossed accordingly. And also the Ingrossement is pleaded as the Statute is penned, for the words of the Statute of 4 H 7 are, After the engrossing of every Fine, the same Fine to be openly read and proclaimed in the same Court, the same Term, and so the words of our plea here pursue the words of the Statute; for the said Statute doth not require by expresse words, that the Fine be engrossed the same Term, but the same is to be conceived by matter of construction and implication, and according to such manner of speech this plea is pleaded. And of the same opinion was Windham, and upon the same reason Anderson conceived, that the Tenant in pleading of the Fine ought to shew in expresse words, that the Fine was engrossed the same Term in which it was levyed; for whoever in pleading a plea will take the benefit of the Statute ought precisely to follow the Statute in all points, and it is clear, that if the Fine be not engrossed, according to the Statute, that then it is not any barre by the Statute, and therefore it ought to be expressly alledged according to the Statute, and not by implication only.

Another Exception was taken to the Barre (as was remembred by Windham) i. pro ut per finem hic in Curia de recordo remanen. plenius apparet; without saying, & per proclamation. inde, &c. But that Exception was disallowed by Periam and Windham, for the Fine had been good and well pleaded, without any such conclusion, pro ut, &c. And also the proclamations are endorsed upon the Fine, and then they appear upon the Fine, according to the words of the said conclusion. And so by Windham are many Presidents, which so in the said Case between Stowel and the Lord *Zouch* cited before, pro ut per finem illum hic de record. remanen. plene liquet. And see 1 Eliz. Plowden 224. between Willion and Barkly, a Fine pleaded without any, pro ut, &c. Anderson took an Exception to the Barre at the beginning of it: i. Quod medietas 60. Messuagiorum, &c. parcel medietatis 70. Messuag. prædict. that that is no good pleading; for one moyety cannot be parcel of another moyety, for every moyety is entire.

Rhodes took Exception to the Replevin, because the Demandant in avoidance of the Fine, that at the time of the Fine levyed Bamfeild was seised, & semper postea, & hucusque, &c. of the moyety in Demesne, and doth not traverse the seisin of the Conusor at the time of the Fine levyed, for here two contrary pleas stand before us in equity of truth; æque vera, æque falsa, æque dubia. And a traverse would have made an end of all, and reduced the matter to certainty: And by Periam, the Barre is not answered, for every Barre ought to be traversed, confessed, or avoided, see 6 H 7. 5. and 6. where it is said by Hussey and Fairfax, where matter in fact is alledged by way of Barre it ought to be traversed, if it be not for the mischeif of tryal, as in case of Bastardy, where a thing is alledged to be done beyond the sea; or to leave the matter in Law to the Court, without putting the same to the Judgement of the Laypeople, &c. See also 5 H 7. 12. Where it is holden, that a thing material alledged in the Barre ought to be directly traversed, or confessed, or avoided in fact or in Law, or conclude the other party by matter of estoppel: And that two affirmatives cannot make a good issue; But the matter alledged in the Replevin scil. that Bamfeild was seised at the time of the Fine levyed shall be holden for void, and the matter alledged in the Barre, scil. that the Conusor was seised, as not answered; for it shall be taken true, until it shall be avoided and destroyed by matter in Law, traverse &c. Vide Librum. So he in default of traverse, the Barre is not answered but argumentative, scil. Bamfeild was seised, ergo, the Conusor was not seised: And it is a common learning that in every Replication there ought to be certainty as to that: See the Case betwixt Fulmerston and Steward 2 Ma. 103. that a Bar ought not to be answered by argument

gument: And as to the certainty which is requisite in a Replication. See the Case betwixt Wimbish and Talboies, Plow. Com. 4 E 6. 42. where the Plaintiff shewed in his Replication his title as Heir, but because he did not shew, how heir, for want of such certainty in the Replication, the Plaintiff could never have Judgment, although the Justices for the matter in Law then in question were clearly resolved for the Plaintiff, and here in this Replication the incertainty is such, that the Court doth not know to which to give credit, to the Plaintiff, or to the Defendant, and the bare matter of the Replication is not sufficient; For in avoidance of a Fine, to say, that a stranger to the Fine, at the time of the Fine levyed, was seised, was never received, but that, partes Finis nihil habuerunt, that was the ordinary plea. Windham to the same intent; that which the Demandant hath alledged in avoydance of the Fine, is but matter of argument and implication. And we ought in this Case first to be insured of the matter of fact; scil. Whether Zouch or Bamfeild were seised, and the Court doth not know to which to give credit, 39 H 6. 49. in Debt by an Executor, the Defendant pleaded, that the Testator made the Plaintiff and one A his Executor, which A is living, and the Plaintiff pleaded, that the said A died within such a Ward before the Writ brought, &c. and adjudged no plea, without traverse, without that, he was dead, for here are 2 affirmatives, whereon a good issue cannot rise, which see 32 H 6. 23. The Def. in a Replevin avows for a Rent service, the Plain. pleads, out of his Fee, the Avowant saith, within his Fee, he ought to traverse, without that that it is out of his Fee, and for default of the traverse the pleading of both parties, as to the several allegations of the seisin in Bamfeild and Zouch may be true, for they both might be Joynt-tenants of the said moyety at the time of the Fine levyed, in which case, as to the moyety of the moyety it is good enough. And yet when in pleading it is alledged, that A was seised, &c. If the other party plead, that A had nothing but joyntly with B he ought to take a Traverse, without that, that A was sole seised, and yet sole seisin is not expressly alledged but when the other party pleads, that A was seised, it ought to be intended a sole seisin. Which see 1 E 4. 9. 37 H 6. 31. And it was never a plea admittable against a Fine, to say, that the Conusor had nothing at the time of the Fine levyed, which see 41 E 3. 14. and also 38 E 3. 1. 3. 8 H 6. 27. In Trespasse the Defendant pleaded the Fine of the Ancestor of the Plaintiff, who said, at the time of the Fine levyed he himself was seised, without that that partes ad finem aliquid habuerunt, which see 46 E 3. 14. and a Fine ought to be avoided by not seisin of the parties to the Fine, and not by the seisin of a stranger to the Fine; and there is not any book in the Law that alloweth such an averment of seisin in a stranger to the Fine, without answering to the seisin of the parties to the Fine, but 13 H 8. In Assise, the Tenant pleaded a Fine upon Render of the Ancestor of the Plaintiff, to which the Plaintiff said, that before the Fine, at the time of the Fine, and afterwards continually, he himself was seised, and the same was holden no plea against such a Fine upon a Render, notwithstanding the privity of blood; contrary, against a Fine which proves a gift precedent.

Anderson to the same intent. The Replication for want of Traverse is incureable, for we as Judges do not know what to do, because that the truth of the matter in fact doth not appear unto us, and so neither the matter in Law, for every plea ought to be traversed, or confessed, and avoided, otherwise nothing appears to us, and we cannot know whether the Conusor or Bamfeild were seised at the time of the Fine levyed, for otherwise the matter in Law cannot rise, and yet I well know, that although a traverse may be spared in respect of a matter in Law which should be choaked and put out of the book by the traverse, or for the mischief of the tryal as aforesaid said, where a thing is alledged to be done beyond sea. 19 E. 4. 6. In debt the Defendant pleaded, that the Plaintiff was born at Denmark, under the obedience of the King of Denmark,

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the Plaintiff by Replication said, that he himself was born at D in England in the County of York, there he shall not take a traverse without that, that he was born at Denmark, for there such tryal cannot be, but in such case the Defendant by way of Rejoynder shall say, that the Plaintiff was born at Denmark, without that that he was born at D in the County of York: And it is true, a supposal of a Writ or Count may be answered to an Affirmative; but a matter alledged by expresse words cannot.

Rhodes, admitting now that the Barre be naught, and the Replication faulty, as it is, then I conceive, that if the point of the Action be confessed by the Barre, the Court shall give Judgement upon the Barre, and shall not meddle with the Replication, but if it be not confessed by the Barre, that then there shall be a Repleader. And I do conceive, that a Repleader may be awarded upon a Demurrer in Law: which see Plow. 1 Ma. in the case betwixt Browning and Beston 138. In Trespasse the Plaintiff doth suppose the Trespasse in two places, scil. in Bermestreet and in Southwark in the County of Surrey; as to the Trespasse in Southwark the Defendant doth justifie by special matter of a Lease, without answering any thing to the Trespasse in Bermestreet. The Plaintiff doth reply, and makes his title by a Lease more ancient then the Lease to the Defendant; upon which the Plaintiff doth demurre in Law. Now the defect in the Barre appearing, the Court awarded a Repleader. And 9 H 6. 35. in a Replevin the Defendant avowed for damage feasant. The Plaintiff made title by Common. The Defendant pleaded a Release of the Common by deed, which was not a perfect deed, upon which the Plaintiff did demurre in Law: And the Replication, in which the imperfect Release was, was holden nought, but because there was a defect in the Barre to the Avowry by the title of Common, the Court awarded, that the parties should replead, not in respect of the vitious plea upon which it was demurred, but in respect of the defect in the Barre: And so in this Case Periam said, that nothing should be awarded in this Case but where an Issue is joyned, for an Issue is alwayes joyned upon a point certain. But upon a demurrer all the parts of the pleading the Count, the Barre, &c. are referred to the Court, as well for the form as for the matter. The book which hath been vouched to the contrary out of 9 H 6. I have procured search to be made for the Roll, but it cannot be found; & it is inconvenient, that after a demurrer a Repleader should be granted, for then Causes should never have an end: And as to the Case betwixt Browning and Beston, the Repleader there was permitted by the assent of the parties, rather than awarded by the Rule of the Court.

Windham to the same intent, that no Repleader shall be in this Case, and he said, that in the time of the Lord Dyer the opinion of the Court was so: And as this case is, the plea in Barre being good, and the Demurrer being upon the Replication, no Repleader should be, for a Repleader shall never be granted, where the plea upon a Demurrer is not good, but if the Barre be not good, and the Defendant doth demurre upon the Replication, there a Repleader may be. And as to Browning and Bestons Case he conceived, that the parties did plead de novo, but not replead, for if it had been a Repleader, then the parties should begin to plead where the first defect was, as if the defect be in the Barre, there the Repleader shall begin, but the Declaration shall stand: But in the said Case of Browning and Beston, the Plaintiff pleaded all de novo, as a new Count, &c. and yet the first defect was in the Barre, and therefore he conceived, that there it was not a Repleader, but that the parties by assent did plead de novo.

Anderson was of opinion, that as this Case is, no Repleader shall be, and yet he held the Repleader might be upon a Demurrer as well as upon an Issue joyned; For a Demurrer joyned is an Issue to be tryed by the Judges, &c. and such was the opinion of Manwood cheif Baron. And the Judgement in the Case betwixt Browning and Beston is not that the parties shall plead de

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novo, but that they shall replead. See there folio 128. a. and in that Case there might well be a Repleader, for there the truth of the matter in fact is confessed in the pleading, but in the Case at Warr it is otherwise, for the pleading is so obscure, that we do not know the truth of the matter, and the right of the matter doth not appear unto us.

And by Periam, as to that which hath been said, that upon the demurrer upon the Replication, the seisin of Bamfeild at the time of the Fine is confessed. Sir, it is not so, for no more shall be holden confessed by a demurrer, but that which is duly and sufficiently pleaded, and because the seisin of Bamfeild is not sufficiently pleaded, therefore not confessed; and for proof of that learning, see the Case betwixt Wimbish and Talbois; and the Case betwixt Hill and Graunge: 1. Mar. Plowd. 171. and see the Case betwixt Partridge and Croker; and so was the opinion of the Lord Anderson, who relyed much upon the Case, where it is said, that in pleading a plea, all matters in fact well and materially alledged by a generall Demurrer are confessed to be true.

Rhodes. Now we are to see, if by the Statute of 27 Eliz. cap. 5. This defect in the Replication may be salved, and I conceive, that this Statute doth extend to all imperfections which happen by the Act; Misprision, or negligence of the Clarks or Councel, for the Client propounds his Cause to the Clark and his Councel to manage in the course of his sute, and if the Clark or Councel erre therein, or in that which to them belongeth: The Client as to that shall be relieved by the Statute; but if there be any defect in the matter, so as the matter will not serve, it is otherwise. As 5 H 7. 1. In the Roll of a plea there were divers spaces (for the year and day) void and blanck, now in another Term, the Judges could not amend them, but now by the said Statute they may. So colour in Assize wanting is helped by this Statute, so the usual averment, & hoc paratus est verificare, &c. left out, the Court hath power to amend it, and so by him the Court by this Statute hath power to amend that defect in Trespass.

Periam to the contrary. And that this default of Traverse is not amendable by the said Statute, for it is enacted by the said Statute, that upon a Demurrer the Judges shall give Judgement as the right of the cause and matter in Law shall require, but in our case, as the pleading now is, no right of the cause or matter in Law appeareth according to which we can judge, for we upon this pleading cannot tell whether the Conusor or Bamfeild was seised at the time of the Fine levyed, for upon the Demurrer upon the Replication the seisin of Bamfeild is not confessed, because it is not well alledged: And if it had been well alledged, yet it had not been confessed, because that the Tenant who demurs upon the Replication, hath in his Bar expressly alledged, that the Conusor was seised: An Originall Writ of Debt against one as Executor in the debet and detinet could not be amended by 8. H. 6. but now by the Statute of 27. Eliz. it may, See 22 E. 4. 21, 22. So nominare for præsentare in a Quare Impedit shall be now amended by this Statute; And in a Writ of Formedon, discendre for remanere shall be amended by the said Statute of 8 H 6. 44 E 3. 13. vi. 11 H. 7. 1, 2, 3. In Assize, upon whom the Plaintiff, where it should be upon whom the Defendant entred; And if the Averment usuall as above was misse-set down, it was amendable, but if it were utterly left out, not, but now in both Cases it is amendable, so, defendit vim & injuriam quando, &c. if it be left out, it is amendable, for all these matters lye in the Conusance of the Clark, but in our Case, the right of the cause and matter doth not appear unto us, for if Bamfeild was seised at the time of the Fine levyed, then as the Demandant and his Councell pretend, the Law is with the Demandant, and if the Conusor and not the Demandant, then the Law is with the Tenant, as his Councell hath argued, so as the right of the cause consists and depends upon the truth of the seisin, which matter doth not appeare unto us: And if we enter in course of amendment,

ment, we doe not know if the Demandant would have traverſed, without that, that the Conuſor was ſeiſed, which ſhall not be a good Traverſe, or abſque hoc, quod partes ad finem aliquid habuerunt, &c. which although it be a good Traverſe in Law, yet we do not know if the truth of the cauſe will ſerve to maintaine ſuch matter, and becauſe without altring matter we cannot amend the Plea: Windham to the ſame purpoſe; For by the Statute of 27. Eliz, we ought to judge in this caſe, as the right of the cauſe and matter in Law ſhall appear; but in this caſe neither the right of the cauſe nor the matter in Law appeareth unto us, according to which we can judge, for we know not to which of the parties to give credit, touching the ſeiſin of the Conuſor, or Bamfeild at the time of the Fine levyed, for as to our judiciall knowledge, both Pleas are to us equally nubious; And he argued the Caſes put before touching amendment of matters upon default of the Clarke, ſcil. de hoc ponit ſe ſuper patriam, left out, ſo, colour in Aſſize, and Treſpaſſe wanting, ſo, & hoc paratus eſt verificare, all which matters are amendable by the Statute of 27. Eliz. But he ſaid, that if in Treſpaſſe the Defendant doth juſtify by a Leaſe for yeares, without ſhewing the place where the Leaſe is made, it is not amendable, for it is matter which lyeth in the notice of the party only, and not in our judiciall knowledge: And as to the Caſe of 5. H. 7. 1. of the places left, he conceived it is not amendable in another Term by this Statute, for that is materiall, and the filling of thoſe ſpaces the parties themſelves ſhall ſupply and not the Court, for the Court ſhall never amend, where their amendment makes alteration of the ſubſtance of the pleading, or of the Verdict, as 20 H. 6. 15. In Treſpaſſe, the Plaintiff declared of a continuando uſque diem impetrationis brevis, viz. 18. die Martii, where the Teſte of the Writ was, 2. die Januarij, the Defendant pleaded to Iſſue, which was found for the Plaintiff, and that Miſpriſion of the Teſte or date of the Writ could not be amended. And no amendment upon this Statute of 27. Eliz. two things are to be conſidered.

Firſt, that the Judges, in ſuch amendment, medle not with matter, nor alter the ſubſtance.

Secondly, that they doe not amend but according to their judiciall knowledge.

Anderſon, to the ſame intent, for as it hath been ſaid before, the truth of the Caſe doth not appeare unto us according to which we can judge, and I conceive that upon any amendment upon this Statute, we cannot take out one Roll and put in another, and as our caſe is we cannot amend this defect without taking out the whole Roll, and therefore in the Caſe of Leonard, which was late Cuſtos brevium here, where in a Replevin he avowed for a Rent ſervice, and upon ſpeciall Verdict the Caſe was, that Sir Henry Iſley held of the ſaid Leonard by Fealty, and the Rent mentioned in the Avowry, and was attainted of high Treaſon, and the King ſeiſed and granted the Land to the Plaintiff, upon whom Leonard avowed for the Rent-ſervice, and I and my companions were agreed, that the rent, notwithſtanding the ſeiſure and grant of the King remained diſtrainable of common right, but Leonard could not have returne of the Cattell, becauſe he had avowed for a Rent-ſervice, and now it appeareth to us upon the Verdict, that he had right to ſo much rent, but not to ſuch a Rent, but a Rent-ſeck diſtrainable of common right; ſo a Rent in another degree; and we alſo argued, that the Avowry was not amendable, for then upon ſuch amendment, we ought to take out a whole Roll, which was not intended by this Statute: And he conceived alſo, that in debt againſt Executors in the Debet & detinet, ſuch a Writ ſhall not be amended by this Statute, and he conceived, that his exception to the Bar, quo ad medietatem, &c. Meſſuag. &c. parcell. medietatis, &c. is relieved by this Statute, for the meaning appeareth: And alſo the exception, that it is not expreſly ſhewed that the Fine was engroſſed in the ſame Term in which it was levyed. And

Periam moved another matter, if now the parties demurring in Law as to part of the Land in demand, and being at Issue upon the residue, if the Court shall adjudge the matter in Law, before the Issue be tryed, or not, 32. H. 6. 5. & 6. In Trespasse for taking of his Cattell, the Defendant as to parcell pleaded not guilty, and as to the remnant pleaded another Plea, upon which the parties did demur, and there they proceeded to tryall before the matter in Law determined, and found for the Plaintiff, and he had Judgement thereupon for the damages, but the costs were suspended untill, &c. And the Defendant brought his Writ of Error, 48 E. 3. 15. In an Action of Wast, as to parcell the Defendant pleads, no Wast, and as to the rest pleaded matter in Law, upon which there was a demurrer joyned; It was holden, that the Issue should not be tryed untill the matter in Law be determined: But it was said by Fulthorpe in Trespasse, if the Defendant to parcell plead to Enquest, and to other parcell matter in Law, in such case he should proceed to tryall presently, and damages should be tared of the whole, as well of that upon which there was a demurrer in Law, as of that of which the Issue was joyned, ad quod non fuit responsum, see also 11 H. 4. 228. In Trespasse, the Defendant pleaded to Issue for part, and for the residue did demur in Law, Processe for the tryall issued before the matter in Law determined; And Periam conceived that the Court might proceed in such Case, the one way or the other: As to the matter in Law, whether the issue in tail upon this Fine should have the Averment, he conceived, that he should not have the said Averment for that it should be very perilous to the Inheritances of the subjects. And he argued much upon the dignity of Fines out of Bracton and Glanvil, whom he called Actores, non Authores Legis; and that Fines, at the common Law, were of great authority untill the Statute of West. 2. And afterwards by the Statute of 34 E. 3. of non-claime, from whence they became to be of so little value in Law, that they were accounted no other then Feoffments upon Record, so as thereby no assurance was of Inheritances but a generall incertainty untill the Statute of 4 H. 7. by which Statute they were restored to their ancient power and virtue: After which Statute many shifts were devised, to creep out of it: So as the Statute of 32 H. 8. was made to take away all questions and ambiguities which were conceived upon the said Statute of 4 H. 7. And therefore we who are Judges ought to frame our Judgements for the maintaining of the authority of Fines, for so the possessions and inheritances of the Subjects shall be preserved; And that is the reason, that if a stranger levy a Fine of my Land in my name, that I have not any remedy but a Writ of Deceit against him who levyes the Fine, so if a Feme-covert levyeth a Fine of her Land as a Feme-sole, the same shall bind her after the coverture, if the Husband do not enter upon the Conusee during the coverture and interrupt the possession gained by the Fine: And 17 E. 3. and our Books are very plentifull to this purpose that the Law doth ægre admit of such allegations against such Fines: A Fine was pleaded in Bar of Land in A, B, and C, he against whom it was pleaded, was not received to aver against the supposall of the Fine, that there was no such Town or Hamlet as A, 46. E. 3. 5. A woman Tenant in tail, had Issue a Daughter, who was inheritable to the tail, the Daughter took a Husband, and they both living, the Mother, and during her seisin, levyed a Fine of the Land entailed to a stranger, sur conusans de droit, come ceo, &c. who rendred the Land to the Husband and Wife in speciall taile, the Husband dyed having Issue, the Wife took another Husband, had Issue, and dyed, the Husband to entitle himselfe to the Land as Tenant by the curtesie, would in pleading have averred the seisin of the Mother at the time of the Fine levyed, and he could not, and yet he was a stranger to the Fine, but he was privy to the estate, and his claime was by her who levyed the Fine, 6 E. 3. 46. Fitz. Averment 40. In a Writ of Entrie, sur disseisin, the Fine of the

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Anceſtor of the Demandant was pleaded in Bar by the name of W, the Demandant in avoydance of it would have ſaid that the name of his Father was R, to have avoided the Fine, but to that he was not received: And 3 E. 3. 32. ſcil. Averment, 42. In a Formdon, the Tenant pleaded Ne dona pas, the Demandant by Replication ſaid, That a Fine was levyed of the ſame Lands, between the Father of the Demandant, and one T, by which Fine the Father of the Demandant did acknowledge to T the Lands, come ceo, &c. and the ſaid T gave by the ſaid Fine to the Father of the Demandant the Land in taile. Where it is ſaid by Stone, that ſince the gift is proved by as high a Record, a man ſhall not aver againſt ſuch matter in avoydance of the ſaid Fine, &c. and yet the party againſt whom it was a ſtranger to the Fine: And ſee 38 E. 3. 7. The Lord ſhall not be received againſt a Fine levyed by his Tenant to aver the dying ſeiſed of his Tenant in his Homage. And as to the Iſſue in tail, he conceived, that the Averment doth not lye for him, for the Iſſue in taile is as much privy, as the Heir of a Tenant in Fee-ſimple. And ſee 33 E. 3. ſcil. Eſtoppell 280. In a Formdon, the Tenant voucheth, the Demandant Counter-pleaded, that the Vouchee nor any of his Anceſtors had any thing in the Land in demand after the ſeiſin, &c. to which the Tenant ſaid, that to that the Demandant ſhould not be received, for the Father of the Demandant after the guift levyed a Fine to the Anceſtor of the Vouchee of the ſaid Land in demand, ſur conuſans de droit come ceo, &c. and the ſame was holden a good bar to the Counter-plea.

And it was ſaid by the Juſtices, That although the Statute of Weſt. 2. of Donis conditionalibus, doth not avoid the Fine as to the for-cloſing of the Iſſue in tail of his Formdon, yet it remaineth in force as to the reſtraining of the heire in tail to aver a thing againſt the Fine as well as againſt the heir in Fee-ſimple, and in all Caſes, where he againſt whom a Fine is pleaded claimes by him who levyeth the Fine, he ſhall not have the ſame Averment, but where he claimes by a ſtranger to the Fine, there he ſhall have it well enough, ſee 33 H. 6. 18. If my Father Tenant in tail, or in Fee, grant the Land by Fine, and afterwards I make Title to the ſame Land by the ſame Anceſtor, and the Fine is pleaded againſt me, I ſhall not be received to ſay that thoſe who were parties to the Fine had not any thing at the time of the Fine levyed, but ſuch a one an eſtranger whoſe eſtate, &c. but it is a good Plea for me to ſay, that after the Fine ſuch a one was ſeiſed in Fee, and did enfeoff me, vi. 22. E 3. 17. before 33 E. 3. Eſtoppell 280. And Dyer 16. Eliz. 334. The Father is Tenant for life, the Remainder in Fee to his Son and Heir, levyeth a Fine to a ſtranger, ſur conuſans de droit come ceo, &c. with warranty, and takes back an eſtate by the ſame Fine, in that Caſe it was holden that the heir ſhould not be received to aver continuance of the poſſeſſion and ſeiſin, either ante finem, tempore finis, or poſt finem, in the Tenant for life, for it is a Feoffment upon Record, and makes a diſcontinuance of the Remainder and Reverſion; The only Book in our Law to maintaine the Averment is 12 E. 4. 15. by Brian, who although he was a reverend Judg in his time, yet he erred in this, that if Tenant in tail be diſſeiſed, and levyeth a Fine unto a ſtranger, ſur conuſans de droit, come ceo, &c. that the Iſſue in tail may well ſay, that partes ad finem nihil habuerunt, but Choke and Little. were clear of a contrary opinion, and ſee in the ſame yeare, fol. 12. by Fairfax and Littleton, that if Tenant in tail where the Remainder is over to a ſtranger, levyeth a Fine ſur conuſans de droit, come ceo, &c. he in the Remainder may aver continuance of ſeiſin againſt that Fine, for he is not party, nor heir to the party, &c. And the Stat. of 4 H. 7. goes ſtrongly to extort ſuch Averment out of the mouth of the Iſſue in tail, for the words concerning the ſame point are, ſaving to every perſon or perſons, not party, nor privy to the ſaid Fine, their exception to avoid the ſaid Fine, by that, that thoſe which were parties to the ſaid Fine nor any of them had ought in the Land at the time of the ſaid Fine

levyed: And it is clear, that the Issue in taile is privy to his Ancestor whose heir to the tail he is, which see agreed, 19 H. 8. 6. 7. And he vouched the Case of one Stamford late adiudged, Land was given to the eldest Son in taile, the Remainder to the Father in tail, the eldest Son levyed a Fine, sur Conusans de droit come ceo, &c. and dyed without Issue in the life of his Father, and afterwards the Father dyed; the second Son shall inherit, but if the eldest Son had survived the Father, and afterwards dyed without Issue, the second Son should have been barred.

Periam to the same intent: It should be very dangerous to the Inheritances of the Subjects to admit of such Averments, and by such meanes Fines which should be of great force and effect should be much weakned, and he put many Cases to the same purpose as were put before by Rhodes Justice, and he shewed how that Fines, and the power of them were much weakned, by the Statute of non-claim, whereof followed (as the preface of the Statute of 4 H. 7. observeth) the Universall trouble of the Kings Subjects, and therefore by the said Statute of 4 H. 7. Fines, for the good and safety of the Subjects were restored to their former Grandeur and authority, which should be construed by us who are Judges, strongly and liberally for the quiet and establishment of present possessions, and for the barring and extinguishing of former rights, and so did the Judges our Predecessors; which see in the Argument of the said Case between Stowell and the Lord Zouch: So see such liberall construction, 19. Eliz. Dyer 351. Where if Land be given to Husband and Wife in speciall tail, and the Husband alone levyeth a Fine and dyeth having Issue, the Issue is barred: And it hath lately been adjudged by the advice of all the Judges of England, upon the Statute of 1. Ma. Viz. All Fines levyed, whereupon Proclamations shall not be dayly made by reason of Adiournment of any Terme shall be of as good force and strength to all intents and purposes, as if such Terme had been holden and kept from the beginning to the end thereof, and not adiourned, and the Proclamations shall be made in the following Terme, which reason in construction of the said Statute, the Judges in the case of the Cookes of London, 20. Eliz. have observed, which see Plowden 538. For although Successors are not mentioned in the said Statute of 4 H. 7. but only Heires, yet the Judges did construe the said Statute to extend to them that they should be bounden as well as the Heires; for it is in the like mischeif, and the said Statute was made for the publick good, and for the repose of the Inheritances of the Subjects of this Realme, and therefore the same ought to be largely extended in the meaning & sense of it, and for the benefit of the Possessors of the Lands, and to the destroying of former rights which were not claimed; It hath been said, that this Fine is but a Fine by conclusion, and not in verity; and therefore not within the Statute. But without question, Fines by conclusion are within the Statute. And that is clear by the Savant, scil. to all persons other then parties to the said Fines, &c. And Periam was against the opinion in Stowells Case by Sanders 356. A Disseisor makes a Feoffment in fee upon condition, the Feoffee levyes a Fine with Proclamation, five years passe, the condition is broken, the Disseisor re-entreth, and Periam conceived that in such Case the Disseissee is bounden for by the Fine, and five yeares non-claime, the right of every stranger is barred, and when the Disseisor entreth for the condition broken, the Fine is not annoyed, but rather confirmed, and former rights shall not be revived. Windham to the same intent, and vouched the Bookes before remembred, and that the meaning of the Statute of 32 H. 8. made upon the Statute of 4 H. 7. was to bind the Issue in tail as strongly as the heire of Tenant in Fee-simple was bound at the common Law, and that Fines by conclusion are as fully within the purview of that Statute as Fines in verity, for Fines by conclusion are Assurances; And as to the objection against our Fine, that it

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is not rite levatus, becauſe that partes ad finem nihil habuerunt,&c. the ſame is no reaſon, wherefore this Fine ſhould not be rite levatus,for theſe words rite levatus, to the externall forme of a Fine are to be taken as to a Fine levyed,coram Edmundo Anderſon & ſocijs ſuis, where all the Juſtices ought to be named, and ſo it ſeemed alſo to Periam and Anderſon; Our caſe had little reſemblance to the Caſe where Tenant in tail makes a Leaſe according to the Statute of 32 H. 8. if he be not ſeiſed at the time of the demiſe, it is void; for the Statute ſpeakes ſeiſed in tail: but ſo are not penned the Statutes of 4 H. 7. & 32 H.8. as 4 H. 7. a Fine levyed ſhall bind privies,& ſtrangers,&c. and 32 H. 8. Fines levyed of any Lands entayled to the Conuſor or any of his Anceſtors, and it is not a Fine in reſpect of the poſſeſſion which paſſeth by the Fine, but in reſpect of the Concord and Agreement.

And Tenant in tail by theſe Statutes hath as great power to bind the right of the entail,although he cannot meddle with the poſſeſſion, as the Tenant in Fee-ſimple at the common Law.

Anderſon to the ſame intent, All the matter reſts upon this point, if the Iſſue in tayl be privy or not,for if he be privy,then clearly he is bounden. And as to that,the Iſſue in tayl before the Statute of 32 H 8. hath been alwayes accounted privy. See 29 H 8. Dyer 32. Tenant in tayl of the gift of the King levyeth a Fine, the ſame ſhall bind his Iſſue, for they are privy. And he argued much upon the Caſes cited by the other Juſtices before, and eſpecially upon the ſaid Caſe of Stowel and the Lord Zouch; how that the Iſſue in tayl is there holden privy; and that the Statute of Fines ought to be taken and conſtrued to enforce the operation of Fines againſt former rights, and for the eſtabliſhment of the preſent poſſeſſions and eſtates. And by him divers rights and perſons are excepted by the ſaid Statute, but this right in groſſe of poſſeſſion,nor the Iſſue in tail,whoſe Anceſtor being out of poſſeſſion levyeth the Fine is not excepted, therefore both of them comprehended in the Statute. And in his argument he ſtood much upon it, how dangerous a matter it ſhould be,to receive ſuch averments and allegations which go meerly in avoidance of Fines, for ſo every Fine might fall in the month of Lay-Gent. which would be very inconvenient. And he concluded his Argument with this Caſe. Tenant in tail doth diſcontinue,and diſſeiſeth his diſcontinuee, and levieth a Fine, the diſcontinuee before the proclamations reentreth,the proclamations are made, Tenant in tail doth re-enter, and dyeth ſeiſed; againſt this Fine his Iſſue ſhall not be remitted. See as to the averment 3 H 6. 27. 33 H 6. 18. 42 E 3. 20. 8 H 4. 8. 12 E 4. 19. by Fairfax and Needham, and fol. 15. by Brian and Choke. And afterwards Judgment was given, that the Demandant ſhould be barred.

Intr. *Paſch.* 29 *Eliz. Rot.* 2112. *In Communi Banco.*

CIII. Gunerſton *and* Hatchers *Caſe.*

CHarles Duke of Suffolk was ſeiſed of three parts of the Manor of D,and Poole was ſeiſed of the fourth part of the ſaid Manor, and afterwards the Duke granted out of the ſaid three parts a Rent-charge of five marks to Gunerſton; and afterwards the ſaid Duke of the ſaid three parts did enfeoffe Hatcher in Fee, after which Poole conveyed his ſaid fourth part of the ſaid Manor to the ſaid Hatcher in Fee,and afterwards Hatcher being ſeiſed,ut ſupra,reciting the ſaid ſeveral purchaſes, eſpecially the ſaid fourth part deviſed to Katherin Hatcher at Will, and Gunerſton diſtreined the Cattel of Katherin Hatcher for the arrearages of the ſaid Rent,and in a Replevin avowed the diſtreſſe: and by the opinion of the whole Court the Avowry was not maintainable,for the fourth part of the ſaid Manor, which was in the poſſeſſion of Avowry.

Poole

Poole, was not charged with the Rent, and although all the Mannor be now in the possession of Hatcher, yet the Mannor is not so consolidated nor united by this unity of possession, but that the owner might wel enough single out, eandem quartam partem, and grant it, and the grantee shall hold the same discharged, as the said Poole held it; and the beasts of the said Katherin shall not be distreined; and so Judgment was given against the Avowant.

CIV. *Mich.* 29 *and* 30. *Eliz. in Communi Banco.*

Voucher.

IT was moved by Serjeant Walmesley, If a common Recovery be to passe at the Barre, and the Tenant is ready at the Barre and voucheth to warr. A, for whom one is ready at the Barre to appear for the vouchee by his warrant of Attorny; It was holden, that this appearance is meerly void, for in such case the vouchee ought to appear in person, because without summons, but where summons issueth, and the same is entred upon the Roll, there may the vouchee at the Return appear in person, or by Attorny at his Election. And that was the clear opinion of all the Justices, and also of the Prejenothories.

Mich. 29. *and* 30. *Eliz. in Communi Banco.*

CV. Keys *and* Steds *Case.*

Formdon.

IN a Formdon by Keys against Sted, the Case was, that Stedd and his Wife were Tenants for life, the Remainder over to a stranger in Fee; and the Writ of Formdon brought against Sted only, who made default after default, whereupon came his Wife and prayed to be received to defend her right; which was denyed her by the Court, for this Recovery doth not bind her, and it is to no purpose for her to defend her right in that Action which cannot here be impeached; Whereupon he in the Remainder came and prayed to be received, and the Court at first doubted of the Receit, forasmuch as if the Demandant shall have Judgement to recover; he in the Remainder might falsifie the Recovery, because his estate, upon which he prayeth to be received, doth not depend upon the estate impleaded, scil. a sole estate, whereas his Remainder doth depend upon a joynt estate in the Husband and Wife, not named in the Writ; But at the last, notwithstanding the said Exception, the Receit was granted. See 40 E 3. 12.

Falsifier of Recovery.

Mich. 29. *and* 30. *Eliz. In Communi Banco.*

CVI. Liveseys *Case.*

Writ of Right

IN a Writ of Right against Thomas Livesey of the Mannor of D, & de duabus partibus Custodiæ Forrestæ de. C. the Tenant did demand the view, and he had it, and return was made, and now the Writ of Habere facias visum, was viewed by the Court, and it was, Visum Manerii & duarum partium Custodiæ, &c. And it was holden by the Court not to be a sufficient view, for the Forrest it self ought to be put in view, scil. the whole Forrest, and not duæ partes tantum, as where a Rent or Common is demanded, the Land out of which the Rent or Common is going ought to be put in view; and there a Writ of Habere facias visum de novo issued forth.

Veiw.

Mich.

Mich. 29. *and* 30. *Eliz. In Communi Banco.*

CVII. Germys *Caſe.*

GErmy brought Debt upon a Bond againſt A as Executor, and the Caſe was, That the Teſtator of A by his Will did appoint certain Lands, and named which, ſhould be ſold by his Executors, and the moneys thereof ariſing diſtributed amongſt his Daughters when they have accompliſhed their ages of one and twenty years; the Lands are ſold, if the moneys thereof being in the hands of the Executors until the full age of the Daughters ſhall be aſſets to pay the debts of the Teſtator? And by the clear opinion of the whole Court, the ſame ſhall not be aſſets, for that this money is limitted to a ſpecial uſe. Debt. Aſſets.

CVIII. *Mich.* 29. *and* 30 *Eliz. in Communi Banco.*

IN an Action of Debt upon an Obligation, the Defendant ſaith, that the Plaintiff ſhall not be anſwered, for he is out-lawed, and ſhewed the Out-lawry in certain, by the name of I S of D in the County of &c. The Plaintiff ſhewed, that at the time of the ſute begun againſt I S, upon whom the Out-lawry was pronounced, the ſaid I S, now Plaintiff, was dwelling at S, abſque hoc, that he was dwelling at D: Vide 21 H 7. 14. And it was holden a good Replication, to avoid the Out-lawry without a Writ of Error, by Anderſon. 10 E 4. 12. For if he were not dwelling at D then he cannot be intended the ſame perſon: See 39 H 6. 1.

CIX. *Mich.* 29 *and* 30 *Eliz. in Communi Banco.*

IT was agreed by the whole Court, and affirmed by the Prejgnothories, That if in Actions the Defendant be adjudged to account, and be taken by a Capias ad computandum, and ſet to mainprize, pendent the Account before the Auditors, and doth not keep his day before them, that now a Capias ad computandum de novo, ſhall iſſue forth againſt him.

Mich 29. *and* 20. *Eliz.* In the Common Pleas.

CX. Gloſſe *and* Haymans *Caſe.*

JOan Gloſſe brought an Action of Treſpaſſe, vi & armis, againſt John Hayman, who pleaded the general Iſſue, and the Jury found this ſpecial matter, That the Plaintiff was a Grocer in Ipſwich, and there held a Shop of Grocery, & quod illa repoſuit fiduciam in the Defendant, to ſell the Grocery Wares of the Plaintiff in the ſaid Shop: And further found, that the ſaid Defendant being in the ſaid Shop in form aforeſaid, cepit & aſportavit, the ſaid Wares, and did convert them, &c. It was moved in Arreſt of Judgement, that this Action, vi & armis, upon this matter doth not lie, but rather an Action upon the Caſe. But the Court was clear of opinion, that the Action doth well lie, for when the Defendant was in the Shop aforeſaid, the Goods and Wares did remain in the cuſtody and poſſeſſion of the Plaintiff her ſelf. And the Defendant hath not any Intereſt, poſſeſſion, or other thing in them, and therefore if he entermeddle with them in any other manner, then by uttering of them: Treſpaſſe, *vi & armis*, againſt a Servant for carrying away his Maſters goods

them by ſale, according to the authority to him committed, he is a Treſpaſſor; for he hath not any authority to carry the Wares out of the Shop not ſold, but all his authority is within the Shop. And Rodes put the Caſe of Littleton 25. If I deliver to another my Sheep, to another to manure his Land, or my Oxen to plow his Land, and afterwards he kills them, I ſhall have an Action of Treſpaſſe againſt him: And afterwards Judgement was given for the Plaintiff.

Mich. 29. *and* 30. *Eliz.*

CXI. Martin *and* Stedds *Caſe.*

RIchard Martin, Alderman of London, brought an Action upon the Caſe againſt Stedd, and declared, That whereas the Queen by her Letters Patents, dated the 27. of Auguſt, anno 24. of her Reign, had granted to the Plaintiff the Office of Maſter of the Mint, through all England, to exerciſe the ſaid Office, ſecundum formam quarundarum Indent. betwixt the ſaid Queen & the ſaid Plaintiff conficiendarum, and that in January following the ſaid Indenture was made, by which it was agreed betwixt the ſaid Queen and the Plaintiff, that the money, in poſterum, ſhould be made in ſuch manner, &c. according to the true Standard; and declared, that he had duly and lawfully made all the money according to the ſaid Standard: Yet the Defendant, machinans, &c. had ſlanderouſly ſpoken and given out ſpeeches in theſe words. Mr. Martin hath not made the money as good and fine as the Standard, by an half penny in the ounce, and ſo he hath ſaved four thouſand pounds. It was objected againſt this Declaration by Walmeſley Serjeant, that here the Plaintiff hath declared upon the Letters Pattents, and the Office given by the Letters Pattents ought to be exerciſed according to the Indenture, &c. And here appears upon the Declaration no Indenture, for no enrolment of ſuch Indenture is ſhewed, and if it be not enrolled, then there cannot be any Indenture betwixt the Queen, &c. and then the Queen cannot have an Action upon it for want of enrolment. See 21 H 7. 21. 1 H 7. 28. and 31. 5 E 4. 7. and alſo if there be not a ſufficient Indenture, then the Plaintiff is not Maſter of the Mint, and then alſo there is not any new Indenture: And then the Plaintiff ought to make the money according to the old Standard; and then might the Defendant well juſtifie the words.

Another Exception was taken, becauſe the Plaintiff is not at any damage, for the Queen cannot have againſt him but an Action of Covenant upon the ſaid Indenture, becauſe the Defendant hath not made the money accordingly, which matter is not actionable, no more then if the Farmer of the Queen had brought this Action againſt one, for ſpeaking that he had broken the condition or covenants of his Leaſe. And as unto theſe words, So that the Defendant hath ſaved four thouſand pounds, thoſe words are not actionable, for it may be he hath ſaved this four thouſand pounds to the Queen; and ſuch conſtruction the Judges ought to make of ſuch ambiguous words in ſuch caſes, ſcil. in optimam partem. It was adjorned.

Mich. 29. *and* 30. *Eliz.* in the Common Pleas.

CXII. Mounſon *and* Weſts *Caſe.*

Challenge. IN an Action of Treſpaſſe between Mounſon and Weſt, the parties were at Iſſue, and now at the Return of the Pannel the Defendant challenged the Array, becauſe it was made by Bartholomew Armin, who took to Wife the Coſin

Coſen German of the Plaintiff, & ex ea, had Iſſue living, the mother being dead: And upon this challenge the Plaintiff did demurre in Law; And it ſeemed to the Lord Anderſon, that it is not a principal challenge, but only to Favour. For the matter of the challenge is not conſanguinity, but only affinity: And ſo it ſeemed to Periam. And Rhodes cited a caſe adjudged in the Kings Bench. Markham brought an Action upon the Caſe againſt Lee, who at the Niſi Prius challenged the Array, becauſe the Sheriffs wife was ſiſter to the Plaintiffs Wife, and that was before the Lord Dyer at Nottingham, and that challenge was holden there, not to be a principal challenge; upon which Error was brought in the Kings Bench: And Error aſſigned in that, and for that cauſe the Judgment was reverſed: And by Windham the Writ of Venire facias is, quia nulla affinitate, &c. ſo as affinity is preſumed in Law not indifferent. And by Anderſon that is to be intended of the Jurors, and not of the Sheriff. 22 E 4. 2. The Array was challenged, becauſe that the Sheriff, &c. had married A Daughter of Eliz. Siſter of the Mother of the Plaintiff, and that was holden a principal challenge 10 H 7. 7. 26 E 3. 21. And afterwards at another Term the Caſe being moved, Anderſon, Rhodes and Windham were clear of opinion, that it is a principal challenge, but Periam hæſitavit, and put a difference betwixt conſanguinity and Affinity, for affinity is not a principal challenge unleſſe it be averred, that the Iſſue, &c. is inheritable to the Land. And Anderſon, put the Caſe in 14 H 7. 2. Where one challenged, becauſe one of the Jurors had married the Mother of the Defendant, it was holden a principal challenge. And 15 H 7. 9. where the challenge was for that the Brother of the Wife of the Defendant had married the Daughter of the Sheriff.

Mich. 29. *and* 30. *Eliz.* in the Exchequer.

CXIII. *Sir* Thomas Greſhams *Caſe.*

Revocation of uſes.

Sir Tho. Greſham being ſeiſed of the Mannors of Walſingham and Milcham in the County of Norfolk, 12 Eliz. enfeoffed B and C to certain uſes, and that was with clauſe of Revocation upon the tender of forty ſhillings, and that after ſuch Revocation he might limit new uſes; and afterwards the year following, Sir Tho. Greſham made the like conveyance of his Lands in the County of Suffolk to the ſaid perſons, to the like uſes, upon like clauſe of Revocation upon the tender of forty ſhillings, Sir Thomas tendered to the ſaid Feoffees one ſum of forty ſhillings to revoke the uſes raiſed upon both the Feoffments; and afterwards raiſed divers uſes of divers of the ſaid Mannors holden in Capite, and afterwards Sir Thomas died: And afterwards it was reſolved by the opinion of the Juſtices, that by that tender the uſes were not revoked, but that the Revocation was utterly void, for two ſeveral ſums of forty ſhillings ought to have been tendered, for they were ſeveral Indentures and could not be ſatisfied by one ſum. After which by a private Act of Parliament, 23. Eliz. the ſaid Revocation was enacted and adjudged to be good and ſufficient in Law. And now the Lady Greſham was called by proceſſe into the Exchequer for a Fine due to the Queen for the ſaid alienation, becauſe that now the ſaid uſes newly raiſed were good, and the ſaid Mannor poſſeſſed accordingly to the limitation of them, for now the Revocation is good, becauſe done by the ſaid Statute which recited the whole ſpecial matter, and that for want of a ſufficient Tender, the Revocation was void in Law, and alſo reciting the new uſes which were declared for the payment of his debts, and many honorable Legacies, and alſo for the ſecurity of thoſe who had purchaſed underneath the ſaid new uſes: For remedy whereof it was enacted, & quod prædict. Revocationes bonæ & ſufficientes in lege habeantur, reputentur, & recognoſcantur. And

Fine for Alienation.

it was argued by Coke, that upon the matter, no Fine is due, for all those new uses took their essence and effect by that Act of Parliament, to which the Queen her self is a party, and the principal Agent, and therefore against her own Act she shall not claim a Fine, &c. And also the alienation without licence is a wrong and trespasse; and an Act of Parliament cannot do wrong, and if partition be made betwixt Parceners by Act of Parliament, no Fine is due to the Queen, which was in ure, 23. Eliz. for by Parliament then a Partition was made betwixt the Co-heires of the Lord Latimer, and I do not know that any Fine hath been demanded for it.

Mich. 29. *and* 30. *Eliz.* in the Common Pleas.

CXIV. Bret *and* Sheppards *Case.*

Debt.

BRet brought Debt upon a Bond against Sheppard, the Bond was endorsed, upon condition, that where the Defendant was arrested at the suit of one A, if now the Defendant shall appear in the Kings Bench where the processe is returnable, that then. &c. And the Defendant sayd in fact, that he had appeared, secundum formam & effectum conditionis supra dict. & hoc petit quod inquiratur per patriam, & prædict. Bret similiter: It was moved, that the parties should replead for this matter, upon which they are at Issue, scil. the appearance is not touchable by Jury, but by the Record: And the Court was clear of opinion, that the parties should replead for the cause aforesaid: And it was moved by the Lord Anderson, that if A be bound to appear in the Kings Bench at such day, and A at the said day goes to the Court, but there no processe is returned, then the party may go to one of the cheif Clerks of the Court, and pray him to take a Note of his appearance: And by Nelson, we have an ancient form of entry of such appearances in such Cases. Ad hunc diem venit I S, & propter indemnitatem suam & Manucaptorum suorum petit quod comparentia sua in Curia hic recordetur. And see for the same 38 H 6. 17. And afterwards the Lord Anderson, inspecto Rotulo, ex assensu sociorum awarded a Repleader: And so by Nelson, it hath been done oftentimes here before, and put in ure: The same Law is, where at the day of appearance no Court is holden, or the Justices do not come, &c. he who was bound to appear, ought to have an Appearance recorded in such manner as it may be; and if the other party pleadeth, Nul tiel Record. it behoveth, that the Defendant have the Record ready at his peril, for this Court cannot write to the Justices of the Kings Bench, for to certifie a Record hither.

Mich. 29 *and* 30. *Eliz.* in the Common Pleas.

CXV. Baxter *and* Bales *Case.*

Debt not extinct by administration.

BAxter brought Debt upon a Bond as Executor of I against Bale; who pleaded that the Plaintiff after the death of the Testator was cited to appear before the Ordinary or his Commissary to prove the Will of the said I, and at the day of his appearance he made default, upon which the Ordinary committed Letters of Administration to the Defendant, by force of which he did administer, so the debt is extinct, &c. but the whole Court was clear of opinion, that the debt was not extinct, for now by the probate of the Will the administration is defeated, and although the Executor made default at the day which he had by the Citation before the Ordinary, yet thereby he is not absolutely debarred, but that he may resort to the proving of the Will whensoever he pleaseth; But if he had appeared and renounced the Executorship it had been

been otherwise; and the debt is not extinct by the Administration in the mean time.

CXVII. *Mich.* 29. *and* 39. *Eliz.* in the Common Pleas.

IN a Franchise the parties are at Issue upon a matter tryable out of the Franchise. And it was moved, if now the Record should be sent into the Common Pleas, and there tryed, and after tryal sent back into the Franchise: Which Periam and Anderson utterly denyed; and by Periam, there is no reason that we should be their Ministers to try Issues joyned before them: And it is not like, where a Liberty or Franchise a Forrein Voucher is to warrant Lands, in such cases we shall determine the Warranty; but that is by a special Statute, scil. the Statute of Glouceſter cap. 12. And Nelson Pzeignothory said, that such an Issue was tryed here of late. Quod nota.

Mich. 29. & 30. *Eliz.* At Serjeants Inne.

CXVII. The Earle of *Arrundell*, and the Lord *Dacres* Case.

PHilip Earle of Arrundell, and the Lord William Howard his Brother maryed the Daughters and Co-heirs of the late Lord Dacres: And now came Francis Lord Dacres as heire male of the said Family, and claimed the Inheritance, &c. And after long sute betwixt both parties, they submitted themselves to the award of Gilbert Lord Talbot, and of Arthur Lord Grey of Wilton, and Windham and Periam Justices; And before them at Serjeants Inne, the matter was well debated by the Councill learned on both sides, and as unto Greistock Lands, parcell of the Lands in question, the Case was. That Tenant in tail makes a Feoffment in fee unto the use of himselfe for his life, the Remainder in tail to his eldest Son, with divers Remainders over, with a Proviso, that if any of the Entailees doe any act to interrupt the Case of any entaile limited by the said Conveyance, that then the use limited to such person should cease, and goe to him who is next inheritable; And afterwards Tenant in tail dyeth, his eldest Son to whom the use in tail was first limited entreth, and doth an Act against the said Proviso, and yet held himselfe in and made Leases, the Lessees enter, the Lessor dyeth seised, his Heir being within age, and in ward to the Queen; It was holden by Shutleworth Serjeant, Yelverton, Godfrey, Owen, and Coke, who were of Councill with the Heirs generall of the Lord Dacres, that here is a Remitter, for by this Act against the Proviso, the use, and so the possession doth accrue to the enfant Son of him, to whom the use in tail was limited by the Tenant in tail: Then when the Tenant in tail after his said Feoffment holds himselfe in, this is a disseisin; for a Tenancy by sufferance cannot be after the cesser of an estate of Inheritance; But admit that he be but a Tenant at sufferance, yet when he makes Leases for yeares, the same is clearly a disseisin, and then upon the whole matter a Remitter, and although the Enfant taketh by the Statute, yet the right of the taile decending to him afterwards by the death of his Father doth remit him, as if Tenant in tail maketh a Feoffment in fee to the use of himselfe for life, the Remainder in tail to his eldest Son inheritable to the first in tail, notwithstanding that the eldest Son takes his Remainder by the Statute, and so be in by force thereof, yet when by the death of his Father, the right of the Entaile discends to him; Ye is remitted. Remitter.

Mich. 29. & 30. *Eliz.* In the common Pleas.

CXVIII. Butler *and* Ayres Case.

Dower. BUtler and his Wife brought a Writ of Dower against Thomas Ayre, sonne and Heir of Bartholmew Ayre, first Husband of the said Margaret Wife of the Plaintiff, and demanded Dower of Lands in A and B; the Tenant pleaded, never seised que Dower, and the Jury found that the said Bartholmew was seised during the Coverture, de omnibus tenementi infra script. preterquam, the Tenements in (sic ut dicta Margareta dotari potuit) Exception was taken to this Verdict; because that this preterquam, &c. doth confound the Verdict, to which it was said by the Court, that the preterquam is idle, and surplusage, for it is of another thing then that which is in demand,, and the seisin of of the first Husband of Lands in A and B is confessed, and the (preterquam) works nothing: Another matter was objected, because here the Jury have assessed damages, as in case where the Husband dyeth seised, the which dying seised is not found by the Verdict: In which Case it was said by the Court, the Demandant might pray Judgment of the Lands; and release damages, or the Demandant may aver that the Husband dyed seised, and have a Writ to enquire of the damages, quod omnes Pregnotarii concesserant.

Mich. 29. *and* 30. *Eliz.* In the Common Pleas.

CXIX. Michell *and* Hydes *Case.*

Dower. DOwer by Michel and his Wife against Lawrence Hyde, who appeared upon the grand Cape; And it was because that the said Hyde in truth was but Lessee for yeares of the Land of which, &c. in which case he might plead non-tenure, if now he might wage his Law of non-summons, so as the Writ be abated; for by the wager of Law he hath taken upon him the Tenancy, and affirmed himselfe to be Tenant, 33 H. 6. 2. by Prisoit, to which it was said by Rhodes, and Windham Justices, that here the Tenant being but Lessee for yeares is not at any mischeif, for if Judgement and Execution be had against him, he notwithstanding might afterwards enter upon the Demandant. Another matter was moved, That where the Writ of Dower was, de tertia parte Rectoriæ de D. & upon that the grand Cape issued, Cape in manum nostram tertiam partem Rectoriæ, and the Sheriff by colour of this Writ took the Tythes severed from the nine parts, and carryed them away with him: And it was agreed by the said Justices, that the same is not such a seisure as is intended by the said Writ, but the Sheriff by virtue of such Writ, ought generally to seize, but leave them there where he found them. And the Court was in opinion to commit the Sheriff to Prison for such his misdemeanor.

Mich. 29. *and* 30. *Eliz.* In the common Pleas.

CXX. Hamington *and* Rydears *Case.*

Debt. RIchard Haming. Executor of Isabell Haming. brought Debt upon an Obligation against Rydear, the Case was, that Kidwelly was seised, and leased for yeares to John Hamington Husband of Isabell, and afterwards John Hamington being so possessed, by his will devised, that the said Isabell should have the

the uſe and occupation of the ſaid Land for all the years of the ſaid Terme as ſhee ſhould live, and remaine ſole, and if ſhee dyed or marryed, that then his Son ſhould have the reſidue of the ſaid Term not expired; John dyed, Iſabell entred, to whom the ſaid Lawr. conveyed by Feoffment the ſaid Land in Fee, & in the Indenture of the ſaid Conveyance Lawr. covenanted that the ſaid Land from thence ſhould be clearly exonerated, de omnibus prioribus, barganijs titulis juribus & omnibus alijs oneribus quibuſcunque, Iſabel took to Huſband, the Son entreth: If now the Covenant be broken was the queſtion, it ſeemed to Anderſon at the firſt motion, that this poſſibility which was in the Son at the time of the Feoffment, was not any of the things mentioned in the Covenant, ſcil. former bargaine, title, right, or charge; But yet it was conceived by him that the word bargaine did extend to it, for every Leaſe for years is a contract, and although that the Land at the time of the Feoffment was not charged, yet it was not diſcharged of the former contract: And by Windham, if I be bounden in a Statute-ſtaple, and afterwards I bargaine and ſell my Lands, and covenant (ut ſupra) here the Land is not charged, but if after the condition contained in the defence be broken, ſo as the Conuſee extends, now the Covenant is broken; And by him, the word (charge) doth extend to a poſſibility, and this poſſibility might be extinct by Livery as all agreed, but not tranſlated by grant, or extinguiſhed by releaſe as it was lately adjudged in the Caſe of one Carter: At another day, it was argued by Walmeſley, and he much relyed upon the words (clearly exonerated) utterly diſcharged, or altogether exonerated, and without doubt it is a charge which may happen, and if it may happen, then the Land is not clare exonerated: And alſo former bargaines, doth extend to it, and the Terme is not extinct by the acceptance of the Feoffment aforeſaid of Kidwelly, and although, that at the time of the Feoffment it was but a poſſibility, and no certaine intereſt, yet now upon the marriage of Iſabell, it is become an actuall burthen and charge upon the Land, and he cited a Caſe adjudged, 8. Eliz. A man ſeiſed of Lands grants a Rent-charge to begin at a day to come, before which day he bargaines and ſells the Lands, and covenants that the ſaid Lands are diſcharged of all charges, in that caſe when the day when the Rent ought to begin is incurred, the Covenant is clearly broken, for the Lands were not clearly exonerated, &c. At another day the Caſe was moved at the Bar: And Anderſon openly in Court declared, that he and all his companions were agreed, that the Land at the time of the Feoffment was not diſcharged of all former Rights, Titles, and charges; and therefore commanded, that Judgement ſhould be entred for the Plaintiff.

Devises.

Covenant.

Hill. 30. *Eliz.* in the Kings Bench.

CXXI. Howell *and* Trivanians *Caſe.*

HOwell brought an Action upon the Caſe againſt Trivanian in the Common Pleas, and declared, that he delivered certain goods to the brother of the Defendant, who made the Defendant his Executor, and dyed, after which the Plaintiff came to the Defendant, and ſpake with him concerning the ſaid goods, upon which communication and ſpeech the Defendant promiſed the Plaintiff, that if the Plaintiff could prove, that the ſaid goods were delivered to the Teſtator, that he would pay the value of them to the Plaintiff: And the Declaration was in conſideration, that the ſaid goods came to the hands of the Teſtator, and alſo afterwards the goods came to the Defendants hands, and upon non Aſſumpſit pleaded, It was found for the Plaintiff, and Judgement given: And afterwards Error was brought in the Kings Bench, and Error aſſigned, becauſe that the Plaintiff had not averred in his Declaration, that he had proved the delivery of the ſaid goods to the ſaid Teſtator, for the words of the promiſe are, ſi probare potuiſſet: And alſo it was aſſign-

Aſſumpſit.

ed

ed for Error, that here is not any consideration upon which this promise could receive any strength, for the Defendant hath not any profit or advantage thereby, scil. by the baylment of the said goods to the Brother of the Defendant; And also it is a thing before executed, and not depending upon the promise, nor the promise upon it: As the Case reported by the Lord Dyer 10. Eliz. 272. The Servant is arrested in London, and two men to whom the Master is well known, bail the said Servant, and after the Master promiseth to them for their freind-ship, to save them harmlesse from all costs and damages, and in an Action upon the Case brought upon that promise, the Plaintiff was barred, for here is not any consideration, for they bayled the Servant of their own head without the request of the Master, and the matter which is alleadged for consideration is executed before the Assumpsit, and the promise was not before the enlargment, and the said baylment was not at the instance, or request of the Master: And the Case of one Hudson was cited, adjudged in the Kings Bench: The Defendant in consideration that he was Administrator, and naturall Son of the Intestate, and that the goods of his Father have come to his hands, promiseth to pay the debt to the Plaintiff. And in an Action upon the Case upon that promise, the Defendant pleaded he made no such promise, and it was found that no goods came to the hands of the Defendant; And it was holden, that the consideration that he was Administrator and Son to the Testator, was not of any force to maintaine the Action, and afterwards in the principall Case the Judgement was affirmed. And it was moved by Coke that Judgement should not be given against the Executor of his own goods if he had not goods of the Testator, for the charge doth not extend beyond the consideration, i.e. That the goods of the Testator came to the hands of the Defendant, but Wray Justice was of opinion, that Judgement shall be of his proper goods, as in Case of confession: Kemp Secondary, if the Action be brought upon Assumpsit of the Testator, Judgement shall be of the goods of the Testator, but of the promise of the Executor, of his owne goods; but the Originall Judgement which is now affirmed was generall.

Hill. 30. *Eliz.* In the Kings Bench.

CXXII. Savell *and* Woods *Case.*

THe Case was; That a Parson did Libell in the spirituall Court against a Parishoner for Tythes of such Lands within his Parish, the Defendant came into the Kings Bench and surmised, and that he and all those whose estate he hath in the Lands out of which the Tythes are demanded, have used to pay every yeare five shillings to the Parish Clarke of the same Parish for all the Tythes out of the same place: And it was argued by Coke, that that could not be, for a Parish Clark is not a person corporate, nor hath succession: But if he had prescribed, that they had used to pay it to the Parish Clark to the use of the Parson, it had been good: Also he ought to shew, that the Parson ought of right to find the Parish Clark, &c. And he cited the Case of Bushie the Parson of Pancras, who libelled in the Spirituall Court for Tithes, The Defendant to have a prohibition did prescribe, that he, and all those, &c. had time out of mind, &c. used to pay to the Vicar, &c. and at last a consultation was awarded because it was tryable in the Ecclesiasticall Court for both parties as well Vicar as Parson, are spirituall Parsons, and the modus decimandi is not in question, but cui solvend. And at another day, it was agreed by the Justices, that of common right, the Parson is not tyed to find the Parish Clark, for then he should be said the Parsons Clark and not the Parish Clark: But if the Parson be tyed to find such a Clark, and such a sum hath been used to be paid to the Parish Clarke in discharge of the Parson, the same had been a good prescription, and so by way of composition, and by Clench

Challenge.

Tithes

Tythes are to be paid to spiritual Persons, but a Parish-Clark is a Lay-person: And afterwards the Court granted a Consultation.

Hill. 30. *Eliz.* in the Kings Bench.

CXXIII. Higham *and* Reynolds *Case.*

IN an Action of Trespasse the Plaintiff declared, that the Defendant 1 Mali 28 Eliz. cut down six posts of the house of the Plaintiff at D. The Defendant doth justifie, because that the Free-hold of the house, 10 Aprilis 27 Eliz. was to I S, and that he by his commandment the same day and year did the Trespasse, &c. upon which the Plaintiff did demurre in Law, because the Defendant did not traverse, without that that he was guilty before or after. And the opinion of Wray was, that the traverse taken was well enough, because the Free-hold shall be intended to continue, &c. Vide 7 H 7. 3. But all the other three Justices were of a contrary opinion to Wray: But they all agreed, that where the Defendant doth justifie, by reason of his Free-hold at the day supposed in the Declaration, there the traverse (before) is good enough: And afterwards Judgement was given against the Defendant.

Hill. 30. *Eliz.* in the Kings Bench.

CXXIV. Kight *and* Footmans *Case.*

IN Trespasse by Kight against Footman, the Case upon the pleading was, that one Margaret had issue two Sons, Richard and Thomas, and surrendred to the use of Richard for life, and afterwards to the use of Thomas in Fee; they both, Thomas being within age, surrender to the use of one Robert app John in Fee, who is admitted; Richard dyeth; Thomas dyeth, having issue A, who is also admitted, and enters into the Land, and if his entry be lawful, or that he be put to his plaint in the nature of a Dum fuit infra ætatem was the Question. And Wray was clear of opinion that it was: And if a man seised of Copy-hold Land in the right of his Wife, or Tenant in tail of a Copy-hold doth surrender to the use of another in Fee, the same doth not make any discontinuance, but that the issue in tail and the Wife may respectively enter; and so was it holden in the Serjeants Case, when Audley, who afterwards was made Chancellor of England, was made Serjeant, and afterwards it was adjudged, that the entry of the case was lawful.

Surrender of Copy-hold Land.

Mich. 29. *Eliz* in the Exchequer.

CXXV. *Sir* Wollaston Dixies *Case.*

AN Information was in the Exchequer against Sir Wollaston Dixie, upon the Statute of Usury: and upon not guilty pleaded: The Informer gave in evidence an Usurious contract upon a bargain of Wares: The opinion of the Court was, that the Information being exhibited for the loan of money, that the Evidence was not pursuing nor leading to the Issue. And yet the Jury against the opinion of the Court upon that evidence found the Defendant guilty. And it was moved in arrest of Judgement, that the Evidence did not maintain the Information, nor prove the Issue, ex parte Querentis, and it was said, there are three things within the Statute, i. three words, i. bar-

Information upon the Statute of 13. Eliz. of Usury.

1. bargain, loane, and chevizance, and these three are several things, and therefore, if the Information be conceived upon loane, and the Informer giveth in Evidence a corrupt bargain for cloth, as it is in this Case, the same doth not maintain the Information; So if the Information be granted upon usurious contract by way of mortgage, and giveth in Evidence an usurious loane, ut supra. But if the Information had been conceived generally, upon an usurious agreement, and giveth in Evidence a loane, the same is good enough, for every loan is an agreement.

Manwood, There cannot be any loane without bargain, nor any forbearing without bargain, for he contracts or bargains to do it, viz. to lend, or forbear: Bargain of forbearing is where the first day of payment is not kept and the parties have agreed for a further day for the payment, &c. And it appeareth in this Case, that it was a bargain to forbear a sum of money which should have been paid before; And the Information here is upon a bargain by way of loane, where was a bargain for forbearing. Fuller, this word (Bargain) in the Statute cannot be intended a bargain for wares or such things, and so distinct from the other two things, &c. If in Information upon loane, an usurious contract had been given in Evidence, that would not maintain the Information: And it was moved in this Case, if the time of the loane or forbearance of the money shall be accounted according to eight and twenty dayes to every moneth, or by the moneths in the Kalender, viz. January, February, &c. And it seemed to some according to the dayes as in case of the Statute of 23. Eliz. of Recusants, and others conceived contrary in both Cases. And Fuller said, That in the Case of policy of Assurance made to warrant a Ship, one was bound to warrant a Ship for twelve moneths; and the truth was, did not perish within the time of the twelve moneths being accounted according to eight and twenty dayes, but being accounted by the Kalender, as January, Feb. &c. it perished, &c. and it was said and holden, that he had not forfeited his Bond. Gent Baron. If I lend one a hundred pounds without any contract for Interest, and afterwards at the end of the year he gives me twenty pounds for the loane thereof, the same is within the Statute, for my acceptance makes the offence without any bargain or contract. And by Clarke Baron, the place where the Defendant accepted excessive Interest ought to be shewed in the Information, but not the place where the contract for the loane or forbearance was made, for the same is not needful. See the Case betwixt Strading and Morgan, Plowd. 200. for the setting down of the place in the Declaration, where the Extortion was committed: The Information here is by way of corrupt bargain and loane. The Defendant took at Dertford such a sum where the taking is layed, apud Dertford, but no place of the corrupt bargain or of the loane. And by Gent. If I lend Beesie for a year, and afterwards he takes further forbearance of another year beyond the rate, the same is within the Statute: but in all Cases, the place where the corrupt bargain was made ought to be certainly alledged: Manwood Baron, the Information is not good for the incertainty of the place, where the corrupt bargain was made; and although there are many Presidents on the Informers part, it is not to purpose, for they were admitted without exception, and then they passed sub silentio, and so of no force. There are three things, or rather degrees of offences within the Statute. In usury, within the Statute, there ought to be corrupt loane, chevisance, or shift. 1. corruption, 2. he ought to take more than one hundred pounds, 3. it ought to be for lending or forbearing. There was a Case in this Court in the time of this Queen, that the Defendant had taken more then ten pounds in the hundred pounds, but in the Information no corruption in the bargain was alledged; and therefore Judgement was given against the Informer: But in the Case at Barre corruption is set forth in facto, and therefore as to that the Information is good enough: As unto the forbearing and giving of dayes of payment the same is alledged in the Information,

mation, but not according to the Statute, for the Statute is in the disjunctive, but the Information is in the copulative; here in our Case the issue is not guilty, under which general issue all the points of the Statute are included and ought to be tryed; as unto the corruption the same is not sufficiently laid, for no place is assigned where the corrupt bargain was made, ergo novisne, for it to be tryed, ergo, no tryal can be, ergo, no issue for it, ergo, this point of the Statute doth not come in issue, nor can it be tryed upon the general issue, not guilty. Also he held, that all the Offence ought to be within the year, for if one make a corrupt bargain for this year, and ten yeares after he takes excessive usury, the same is not within the Statute to inform upon it. And in truth there is no such offence without corrupt bargain, so as he conceived, that the word (Lending) is a strange word, but where the Statute is forbearing or giving day of payment, and in the Information it is giving and forbearing in the copulative, that is good enough, for the one word enforceth the other, and is not double. Also the Information hath not shewed whose money it is, and therefore it is not good: And afterwards Judgement was given against the Informer; and a Writ of Error thereupon brought in the Exchequer Chamber. And it was argued by Popham Attorney General, that Judgment ought to have been given for the Queen and the Informer, for the shewing of the place where the corrupt bargain was made needs not to be alledged in the Information, for the offence punishable by the Statute is the receipt of excessive usury, and not the contract: And it was the Case of one Bird, 20 Eliz. where the Plaintiff shewed the place of the Receipt, and not of the contract, and yet had Judgement for the Queen, without any exception to it before Judgement, or Error after, for the contract is but inducement to the receipt, and it shall be tryed where the taking was; therefore it is not necessary to shew the place of the bargain: And it was adjorned.

Mich. 30. *Eliz.* in the Exchequer.

CXXVI. Saliard *and* Everats *Case.*

THomas Saliard and Hen. Everat being Recusants convicted, and not having paid twenty pounds for every moneth, a Commission issued forth to enquire of their goods and Lands in the County of Suffolk, to levy thereon the Debt and penalty due to the Queen. And now the Commission being returned, the parties appeared, and by their Councel shewed, that some of their Lands returned in the Commission are Copy-hold, and prayed as to those, Manus Dominæ Reginæ amoveantur, and that upon the Statute of 29 Eliz. cap. 5. concerning Recusants: viz. that upon default of payment of penalties, &c. which processe issued out of the Exchequer to take and seize all the goods, and two parts as well of all the Lands, Tenements and Hereditaments, Leases and Farmes of such Offender, as of all other the Lands, Tenements, and Hereditaments, liable to such seisure, or to the penalties aforesaid, by the true meaning of this Act, leaving the third part, &c. And Popham Attorney General moved, If a Recusant hath more then a third part of his Lands in Copy-hold land, if this Copy-hold as to the surplusage shall be lyable to the penalty. Manwoood cheif Baron conceived, that the Copy-hold is liable in this Case by the Statute, although not directly by expresse words yet within the intent of it, and that by reason of these words al other the lands, &c. lyable to such seisure, &c. Walmes. Serjeant, Copy-hold is not lyable to a Statute Merchant or Staple, also if the Queen hath the Copy-hold, how shall the Lord have the services which the Queen cannot do: Also a Copy-hold is not an Hereditament within this Statute, which extends only to Hereditaments at the common Law, and not by custom: Also in Acts of Parliament which are enacted

Recusants.

for forfeiture of Lands, Tenements, and Hereditaments, by those words they shall not forfeit Copy-holds: Clarck Baron, this Statute was made to restrain Recusants from taking the benefit of their Livings, and Copy-holds are their Livings as well as Free-holds, and by this Statute, the Queen shal not have every estate in the Copy-hold Land, but only the taking of the profits; but the scope of the Statute was to impaire the Livings of Recusants, and that by driving of them for want of maintenance to repaire to the Church.

Walmesley, If the Statute had given to the Queen to seise two parts of their livings, then the Statute had extended to Copy-holds, Manwood, when a Statute is made to transfer an estate by name of Lands, Tenements, and Hereditaments, the Copy-hold is not within such Statute, but if the Lords Signiory, his Customes and Services, are not to be impeached, or taken away by such Statute, then it is otherwise; for such Statute doth not make another Tenant to the Lord; And by him Copy-holder shall pay Subsidies, and he shall be assessed according to the value of his Copy-hold as well as of his Free-hold, and in this Case, the Queen is to have the profits of the Lands only, but no estate. At another day, the case was argued for the Recusants by Snagg Serjeant, and he said, that these words Lands, Tenements, and Hereditaments are to be construed, which are such at the common Law, not by Custome: If I give to one all my Lands, Tenements, and Hereditaments in D, my Copy-holds do not passe, and Statutes which are made to take away Possessions and Hereditaments out of persons ought to be strictly taken, and not by Equity: The Statute of 13. Eliz. of Banckrupts enacts, that the Commissioners may sell the Lands and Tenements of the Banckrupts, if the Statute had not made a further provision, the Commissioners could not sell Copy-hold Lands, but there are expresse words in the Statute for that purpose, i. e. as well copy as fee: Also the Statute of 13. Eliz cap. 4. of Auditors and Receivers of the Queen doth not extend to Copy-holds: And it should be a great prejudice to the Lords of such Copy-holds, that the Queen should have the Lands, Popham, the intention of the Law sometimes causes a liberall construction of a Statute in a letter of it; sometimes a strict and precise exposition, and here it appeareth, that the intention of the Statute was, that the Queen should have all the goods of the offender, and two parts of the Lands, &c. Leases and Farmes, and the Recusant but the third part of all his Lands only; And therefore the Recusant is not to have any other thing but only that which is allotted to him by the Statute, and that is the third part which is all the maintenance which the Law allows him, and then if Copy-holds be not within this Statute, a Recusant who hath great possessions in Copy-holds, and hath no Free-hold should be dispunishable, and hath his full maintenance against the meaning of the Statute: And he said that many things are within the meaning of a Statute, which are not within the words, as Bonds, Obligations and Specialties made to Recusants, shall passe to the Queen by this Statute by force of the word, goods, according to the meaning of the Statute, and all personall things are within the Statute, &c. profits of the Lands, Advowsons, and the like; and the very scope of the Statute was to take away from Recusants all personall things whatsoever, and two parts of reall things, as Leases, Farmes, Lands, Tenements, &c. with the intent that with the superfluity of their goods and possessions, she should not maintaine Jesuits, and Seminary Preists, people more dangerous then the Recusants: And by him; Lands in ancient demesne are lyable to the use, penalties by the Statute, although not by expresse words; So if a Recusant hath Lands extended by him upon a Statute acknowledged unto him, that Interest is not properly a Lease, or Farme, yet it is Land within this Statute lyable, &c. And if I be Tenant by Elegit, or Statute, &c. of Lands in D, not having other Lands in the said Towne, and I grant all my Lands in D, my Interest, ut supra, shall passe

What Statutes extend to Copy-holds.

paſſe, contrary; If I have other Lands there: And I grant, that if I have Copy-hold Lands in D, and none other, and I grant all my Lands in D, Copy-hold Land ſhall not paſſe by ſuch aſſurance; becauſe that Copy-hold cannot paſſe but by ſurrender; If I put out a Copyholder out of his Lands, the ſame is a Diſſeiſin, to the Lord of whom the Copy-hold is holden: And if I levy a Fine of ſuch Lands and five yeares paſſe, not only the Lord is bounden as to his Free-hold and Inheritance, but alſo the Copy-holder for his poſſeſſion, for the intent of the Statute of 4 H. 7. was to take away controverſies, & litibus finem imponere, and contention may be as well for Copy-hold as for Land at the common Law: Ye who hath a Leaſe for yeares to begin at a day to come, he who hath the Freehold thereof is diſſeiſed, the Diſſeiſor levyeth a Fine, five yeares paſſe, he who hath the Free-hold is bound by it, but not he who hath the Intereſt for years in futuro, as it hath been lately adjudged; But he ſaid, That if that poynt were to be handled againe, the Law would be taken to the contrary, but it is clear that a Leaſe in poſſeſſion ſhall be bound by ſuch Fine; And as unto any prejudice to the Lord it is clear, that notwithſtanding that the Queen hath the Copy-hold Land, yet the Lord ſhall have the Rent during the poſſeſſion of the Queen, which is the moſt valuable part of the ſervices of the Copy-holder; the Statute of 1 E. 6. of Chantryes, doth extend to Copy-hold, by the generall words, Lands, Tenements, and Hereditaments, for otherwiſe the Proviſo which excepts Coy-holds were not neceſſary: And in our Statute, the words are Lands, Tenements, and Hereditaments which are forceable words, which proves that our expoſition to extend it to Copy-holds is proper and agreeable to the Statute, and this in the firſt braunch of it, for Copy-hold is ſome Land, Tenement, or Hereditament, the clauſe in this braunch of the Statute is, and alſo all other the Lands, Tenements, and Hereditaments lyable to ſuch ſeiſure, &c. the ſame is to be meant of ſuch Lands which are bound with clauſe of revocation, of which is ſpoken in the former part of this Statute. He who departs out of the Realme againſt the Statute of 5 R. 2. ſhall forfeit his goods, and thereby his debts alſo: The King grants, omnia bona & catalla fellonum, Debts of Felons ſhall paſſe; Ergo Copy-holds alſo, by the name of Lands, Tenements, &c. as well as debts by the name of goods: In our Caſe, the meaning of the Statute was, that the Queen ſhould have two parts of the whole eſtate of the Recuſant, be it Copy-hold, Ancient demeſne, &c. If upon the Statute of Banckrupts, a Copy-hold eſtate be ſold to the King, the King ſhall pay the Rent, but ſhall not doe any of the ſervices, and in ſo much the Lord ſhall be prejudiced; patiatur etiam & hic, rather then Recuſants ſhould not be puniſhed, and it is not a ſtrange thing in Law, that the Lord of a Copy-holder ſhould be prejudiced for the offence of his Tenant, as where a Copy-holder is outlawed, the King ſhall have the profits of his Copy-hold Lands, and the Lord hath not any remedy for his Rent,

Paſch. 30. *Eliz.* In the Kings Bench.

CXXVII. Stebbs *and* Goodlacks *Caſe.*

BEtwixt Stebbs and Goodlack, the Caſe was, the Parſon of Letcome in the County of Berks, libelled in the Spirituall for Tythes, the Defendant ſhewed, that the cuſtome of the Towne of Letcome is, that the Parſon ſhall have for his Tythes the tenth Land ſowed with any manner of corne, and he ſhall begin his reckoning alwayes at the firſt Land which is next to the Church, &c. The Parſon ſhewed that the Defendant, by fraud and covin ſowed every tenth Land which belonged to the Parſon, ut ſupra, very ill and with ſmall quantity of corne, and did not dunge or manure it as he did the other nine parts, by meanes whereof, whereas the other nine every of them yeilds

Fraud ſhall not avoid payment of Tythes.

yeilded eight cocks, the tenth yeilded but three cocks, and for this matter the Parson libelled in the Spirituall Court and confessed the custome, but for abusing of the custome prayed to have his Tythes in kind, the Defendant prayed a prohibition, and the Parson afterwards a consultation: And the opinion of Wray Justice was that the custome was against common reason, and so void, but if it be a good custome, then the Parson shall have the Action upon the case.

Pasch. 30. *Eliz.* in the Kings Bench.

CXXVIII. Rumney *and* Eves *Case.*

Copy-holder. IN Ejectione firmæ by Jane Rumney against Lucie Eve, it was holden, that if customary Land do descend to the younger Son by custom, and he enters and leaseth it to another, who takes the profits, and after is ejected: That he shall have an Ejectione firmæ without any admittance of his lessor or presentment that he is heir. For which the Defendant shewed, that there were thirty yeares incurred betwixt the death of the Father, and the making of the Lease, so that here is supina negligentia, which shall disable his person to make any demise, quod fuit concessum. In answer of which it was said, that the Lessor at the time of the death of his Ancestor was but of the age of two yeares, and that after his full age no Court had been holden for a long time, and that at the first Court that was holden, which was of late, he prayed to be admitted, but the Steward refused to admit him; and the same was holden a good excuse of his negligence: And it was holden, that the Plaintiff ought not to shew that the Lease is warranted by the custome, but that shall come of the other side; and so it had been lately adjudged, which Wray granted: And by him, if a Copy-holder surrender in extremis to the use of himself for life, &c. If he shall be well again, the surrender shall stand, for he hath reserved an estate to himself. It was further holden in the Case, that if a Copy-holder dyeth, his Heir within age, he is not bound to come at any Court during his non-age to pray admittance, or to tender his Fine: Also if the death of the Ancestor be not presented, nor proclamations made, he is not at any mischeif, although he be of full age.

Pasch. 30. *Eliz.* in the Kings Bench.

CXXIX. Saint-John *and* Petits *Case.*

IT was covenanted betwixt Saint-John and Petit, that Saint John should present Petit to the Church of A; and that afterwards Petit should lease the Parsonage to Saint-John, or to any other person named by him, and that the said Petit should not be absent by eighty dayes, and that he should not resign; and Petit was bound to perform those Covenants, and Petit is presented to the Benefice: Saint-John brought an Action upon the Obligation, pretending, that he could not enjoy his lease by reason of the absence of the said Parson, &c. And the Lease was made to the Curate at the nomination of Saint-John: The Parson said, that the Obligation is void by the Statute of 14 Eliz. cap. 11. See the Statute, All Leases, &c. made by any Curate shall be of no better force, then if they had been made by the beneficed Parson himself. Tanfeild by 13. Eliz. 20. When a Parson leaseth to his Curate, who leaseth over. The Statute doth not make the Lease void by any absence of the Parson, but of the Curate by forty dayes. Quære. For that it seemeth, that by the Statute of 14 Eliz. the Curate cannot lease, &c.

Pasch.

Pasah. 30. *Eliz.* in the Kings Bench.

CXXX. Gates *and* Halliwels *Case.*

BEtwixt Gates and Halliwell the Case was, one having two Sons, devised, that his eldest Son with his Executors should take the profits of his Lands until his youngest Son should come to the age of two and twenty yeares, and that then the said youngest Son should have the Land to him and the Heires of his body: It was holden clearly by the whole Court, that the eldest Son should have Fee in the interim untill the youngest Son came to the said age.

Pasch. 30. *Eliz.* in the Kings Bench.

CXXXI. Prowse *and* Caryes *Case.*

PRowse brought an Action upon the Case against Cary for words: That the Plaintiff did subborn, procure, and bring in false Witnesses in such a Court at Westminster, &c. The Defendant pleaded, Not guilty: And it was found, that he did procure and brought in false Witnesses, but was acquitted of the subborning. It was objected, That the Action doth not lie, for it may be, that the Defendant did not know that he would depose falsly: Thou art a forger of false Writings are not actionable, and so it was adjudged, for it may be understood of Letters of small importance; but that Exception was not allowed, for it shall be taken in malam partem, and cannot be spoken of any honest man.

CXXXII. *Pasch.* 30. *Eliz.* in the Kings Bench.

A Was bounden in an Obligation to B upon condition, that if A deliver to B twenty Quarters of Corn the nine and twentieth of February next following, datum presentium, that then, &c. and the next February had but eight and twenty dayes: And it was holden, that A is not bounden to deliver the Corn, untill such a year as is Leap-year, for then February hath nine and twenty dayes, and at such nine and twentieth day he is to deliver the Corn, and the Obligation was holden good.

Pasch. 30. *Eliz.* in the Kings Bench.

CXXXII. Allen *and* Palmers *Case.*

THe Case was, a Copy-holder did surrender his Lands to the use of a stranger for life, and afterwards to the use of the right Heires of the Copy-holder, who afterwards surrendred his Reversion to the use of a stranger in Fee, and dyed, and the Tenant for life dyed, and the right Heir of Palmer the Copy-holder entred; And by Cook nothing remained in the Copy-holder upon the said surrender, but the Fee is reserved to his right Heires, for if he had not made any such second surrender, his Heir should be in, not by descent but by purchase. And the common difference is, where a surrender is to the use of himself for life, and afterwards to another in tail the remainder to the right Heirs of him who surrendreth, there his Heirs shall have it by descent, contrary where the surrender hath not an estate for life or in tail limitted to him, for there

Copy-holder surrenders where his heir shall be in by purchase.

there his Heir shall enter as a purchasor, as if such use had been limitted to the right Heires of a stranger. And by him, if a Copy-holder surrender to the use of his right Heires, the Land shall remain in the Lord until the death of the Copy-holder, for then his Heir is known, &c. See Dyer 99. The Husband made a Feoffment to the use of his Wife for life, and afterwards to the use of the right Heires of the body of the Husband and Wife begotten, they have issue, the Wife dyeth, the issue cannot enter in the life of his Father, for then he is not his Heir. See Dyer 7 Eliz. 237. The Husband is sole seised in Fee, and leby eth a Fine of the Land to the use of himself and his Wife, and the Heires of the Husband, and they render the Land to the Conusor for the life of the Husband, the remainder to B for life, the remainder to the right Heires of the Husband: The Husband dyeth, B dyeth: Now the Wife shall have the Land for the life of the Wife, for she shall not loose her estate by that tender, and this remainder to the right Heires of the Husband is void, and the Land and estate in it is in him as a Reversion, and not as a Remainder. And a man cannot tail a Remainder to his right Heires whilest he is living, unlesse it begin first in himself. See Br. 32 H 8. Gard. 93.

Pasch. 30. *Eliz.* in the Kings Bench.

CXXXIV. Pearle *and* Edwards Case.

Assumpsit. Consideration

THe Case was, that the Defendant had leased Lands to the Plaintiff rendring Rent for certain yeares, and after some yeares of the Term expired the Lessor in consideration that the Lessee had occupied the Land, and had paid his Rent, promised the Plaintiff to save him harmlesse against all persons, for the occupation of the Land past, and also to come: And afterwards H distreined the Cattel of the Plaintiff being upon the Lands, upon which he brought his Action. Golding, here is not a sufficient consideration, for the payment of the Rent is not any consideration, for the Lessee hath the occupation of the Land for it, and hath the profits thereof; and also the consideration is past: Cook, the occupation, which is the consideration, continues, therefore it is a good Assumpsit, as 4 E 3. A Gift in Frank-marriage after the espousals, and yet the marriage is past, but the blood continues, so here; and here the payment of the Rent is executory every year; and if the Lessee be saved for his occupation, he will pay his Rent the better. Godfrey, If a man marrieth my Daughter against my will, and afterwards in consideration of that marriage I promise him one hundred pounds, the same is no good consideration, which Clench Justice denyed. And afterwards the Plaintiff had Judgement to recover his damages.

Pasch. 30. *Eliz.* In the Kings Bench.

CXXXV. Wakefords *Case.*

Extinguishment of Copy hold by Release.

THe Earl of Bedford Lord of the Mannor of B, sold the Free-hold Interest of a Copy-holder [of Inheritance unto another, so as it is now no part, but divided from the Mannor, and afterwards the Copy-holder doth release to the purchasor. It was holden by the Court, that by this Release the Copy-hold Interest is extinguished, and utterly gone; but it was holden, that if a Copy-holder be ousted, so as the Lord of the Mannor is disseised, and the Copy-holder releaseth to the Disseisor nihil operatur.

Pasch:

Pasch. 30. *Eliz.* in the Kings Bench.

CXXXVI. Docton *and* Preists *Case.*

IN Trespasse for breaking of his Close, it was found by special verdict, that two were Tenants in common of a house, and of a close adjoyning to the house, and they being in the house make partition without deed of the house and the close, see 3 E 4. 9. 10. Partition without deed upon the Land is good enough: Vide 3 H 4 1. and it seems by 3 E 4. Partition made upon the Land amounts to a Livery: Vide 2 Eliz Dyer 179. Partition by word out of the County void, 19 H 6. 25. Betwixt Tenants in common not good without deed; 47 E 3. 22. being upon the Land it is good without deed: Two Joynt-tenants make partition by word, make partition in another County, the same is no partition, for as to that matter the common Law is not altered by the Statute, but as to compel such persons to make partition. Wray Justice conceived, that the partition here being without deed was not good, although made upon the Lands: Vide 18 Eliz. Dyer 35. And at another day Wray said, that partition by Tenants in common without deed wheresoever it is made is good, but in this case it appears, that the parties who made the partition were in the house (for they were Tenants in common of the Messuage and a close adjoyning to it) and made partition, that one should have the house, and the other the close, so as they were not upon the close when they made the partition, and then it was void for the close, and if for the close then also for the house. And Judgement was given accordiuly.

Pasch. 30. *Eliz.* inthe Kings Bench.

CXXXVII. Cook *and* Songats *Case.*

IN an Action upon the case by Cook against Songat, the Plaintiff declared, Quod cum quædam Lis, and controversie had been moved betwixt the Plaintiff Lord of the Mannor, &c. and the Defendant claiming certain Lands parcel of the said Mannor, to hold it by copy; and whereas both parties submitted themselves to the Judgement and Arbitrament of I S Councellor at Law, concerning the said Land, and the title of the Defendant to it: The Defendant in consideration. That the Plaintiff promised to the Defendant, that if the said I S should adjudge the said Copy to be good and sufficient for the title of the Defendant, that then he would suffer the Defendant to enjoy the said Land accordingly without molestation: The Defendant reciprocally promised the Plaintiff, that if the said I S should adjuge the said Copy not sufficient to maintain the title of the Defendant, that then he would deliver and surrender the possession of the said Land to the Plaintiff without any sute: And shewed further, that I S had awarded the said Copy utterly insufficient, &c. yet the Defendant did continue the possession of the Land, &c. And by Godfrey, here is not any consideration: But by Gawdy, the same is a good and sufficient consideration, because it is to avoid variances and sutes: And Judgement was given for the Plaintiff.

Pasch. 30. *Eliz.* in the Kings Bench.

CXXXVIII. Pawlet *and* Lawrences *Case.*

GEorge Pawlet brought an Action of Tresspasse against one Lawrence Parson of the Church of D, for the taking of certain carts loaded with Corn, which he claimed as a portion of Tythes in the Right of his Wife; and supposed the Tresspasse to be done the seven and twentieth of August, 29 Eliz. and upon Not guilty it was given in evidence on the Defendants part, that the Plaintiff delivered to him a Licence to be married, bearing date the eight and twentyeth of August, 29 Eliz. and that he married the Plaintiff and his said Wife the same day, so as the Tresspass was before his title to the Tythes, And it was holden by the whole Court, that that matter did abate his Bill: But it was holden, that if the Tresspasse had been assigned to be committed one day after, that it had been good, but now it is apparent to the Court, that at the time of the Tresspasse assigned by himself, the Plaintiff had not tythe, and therefore the Action cannot be maintained upon that evidence, for which cause the Plaintiff was Non suit.

Mich. 30. *Eliz.* in the Kings Bench.

CXXXIX. *Sir* John Braunches *Case.*

Forfeiture. IN the Case of Sir John Braunch, it was said by Cook, that if a Copy-holder be dwelling in a Town long distant from the Mannor, a general warning within the Mannor is not sufficient, but there ought to be to the person notice of the day when the Court shall be holden, &c. For his not coming in such
Copy-holder. case cannot be called a wilful refusal: So if a man be so weak and feeble
Forfeiture. that he cannot travel without danger, so if he hath a great Office, &c. these are good causes of excuse: It was also holden, that if a Copy-holder makes default at the Court, and be there amerced, although that the amercement be not estreated, or levyed, yet it is a dispensation of the forfeiture. Gawdy Justice, If the Copy-holder be impotent, the Lord may set a Fine upon him, and if he will not pay the Fine, then it is reason that he shall forfeit his Land. Egerton Solliciter, Warning to the person of the Copy-holder is not necessary, for then, if the Lord of a Mannor hath one Copy-holder of it dwelling in Cornwall, and another in York, &c. the Lord ought to send his Bayliff to give notice of the Court to them, which should be very inconvenient, and by him continual default at the Court doth amount to a wilful refusal. And by the whole Court, general warning within the Parish is sufficient, for if the Tenant himself be not Resient upon hts Copy-hold but elsewhere, his Farmer may send to him notice of the Court: And it was further given in evidence, that Sir John Braunch had by his Letter of Attorney appointed the Son of his Farmer his Attorney to do the services for him due for his said Copy-hold: And it was holden that such a person so appointed, might essoine Sir John, but not dos the services for him, for none can do the same but the Tenant himselfe.

Mich. 30. *Eliz.* In the Kings Bench.

CXL. Wilkes *and* Persons *Case.*

JOhn Wilkes and Margery his Wife, and Thomas Persons brought Tresspas, Quare clausum fregit, herbam suam messuit, & fænum suum asportabit, ad damnum ipsius Johannis, Margeriæ, & Thomæ; And exception was taken, that it was not the Hay of the Wife, nor she was not damnified by it, but her Husband: Wray Justice, the Declaration is good enough, for although it be not good for the Hay, yet clausum fregit & herbam messivit, makes it good: And Judgement was given for the Plaintiffs. Trespasse.

Mich. 30 *Eliz.* In the common Pleas.

CXLI. Atkinson *and* Rolfes *Case.*

IN an Action upon the case by Atkinson against Rolfe, the Plaintiff declared, that the Defendant in consideration of the love which he bore unto A his Father, did promise that if the Plaintiff would procure a discharge of a Debt of I S, which his said Father owed to the said I S, that he would save the Plaintiff harmlesse against the said I S; And declared further, that he had discharged the Father of the Defendant from the said Debt, and is become bounden to the said I S, in an Obligation for the payment of the said Debt, upon which Obligation the said I S hath sued the Plaintiff, and hath recovered, and had execution accordingly, and so hath not been saved harmlesse, &c. It was objected, that the Declaration was not good, because the Plaintiff hath not shewed in his Declaration, that he had given notice to the Defendant of the said Obligation, or of the sute brought against him, but that was not allowed, but the Declaration was holden to be good, notwithstanding the exception. Shutleworth, if I be bounden to make to you such an assurance as I S shall devise, I am bound at my perill to procure notice: but if I be bounden to you to make such assurance as your Councill shall advise, there notice ought to be given unto me. It was adjorned. Notice.

Mich. 30 *Eliz.* In the common Pleas

CXLII Beare *and* Underwoods *Case.*

IN a Replevin it was agreed by the whole Court, that the Plaintiff cannot discontinue his sute without the privity of the Court, for as Leonard, Custos brevium, said, the Entry is, Recordatur per curiam; And if the Plaintiff would discontinue without moving the Court, the Defendant may enter the continuance if he will; It was also holden, that where an Originall is discontinued, the Defendant shall not have costs, but if the Plaintiff be non-sute the Defendant shall have costs by 32 H. 8. 16. But after a discontinuance in a Latitat, the Defendant shall have costs by the Statute of 8. Eliz cap 2. And in this case it was agreed, that the Plaintiff may be non-sute after a Demurrer, and so he was. Discontinuance of sute in court.

Pasch. 30. *Eliz.* In the Kings Bench.

CXLIII. Jerom *against* Neale *and* Clave.

GEorge Jerom, and Avice his Wife brought an Action of Tresspasse of Assault and wounding of the Wife, and the Action was laid in Midd: and brought against Neale and Clave, who pleaded that Salisbury is an ancient City, and that within the same, there is this custome, that if any make an Assault and Battery.

Mich

Affray, and assault any Officer of the said City, or any other person, if he upon whom such assault is made, complaine unto the Mayor of the said City, that the Mayor for the time being may send for him who made the Affray as a Justice of Peace, to make him to answer to it, and shewed further, that the said Jerom made an Affray within the said City, of which complaint being made to the Mayor, the said Mayor sent the Defendants being Constables to bring the said Jerom to him, by virtue whereof, they went to the House of the Plaintiff, and signified to him the commandment of the said Mayor, and would have brought the Plaintiff to him, and the Wife of the Plaintiff did assault them, and they moliter put their hands upon the said Wife, which is the same assault, battery, and wounding, &c. upon which it was demurred in Law: Coke for the Plaintiff; This custome is not good, or reasonable: See Magna charta 29 Nullus liber homo capiatur, vel imprisonetur, &c. nisi per legale judicium parium suorum vel per legem terræ, therefore shall not be taken or imprisoned upon a bare suggestion, and see 24 E. 3. Br. Com. 3. where a Commission issued to take all which were suspected notoriously for Felonies and Trespasses, although they are not endicted, and the same was holden against the Law, and therefore it was revoked, and see the Statute of 5 E. 4. 9. 25 E. 4. 13. 28 E. 4. 13. 28 E. 3. 3. 37 E. 3. 18. & 42 E. 3. 3. 2. To be a Justice of Peace doth not lye in Prescription. For one Justice of Peace was before the Statute of 1 E. 3. and then the Commencement being known, prescription cannot be of it, 3. Admit, that the Mayor was a Justice of Peace, yet he cannot determine any thing out of the Sessions, 4. the Prescription is, that the Mayor might send for him, and doth not say within the City, and it shall be an unreasonable Prescription to say, that the Mayor might send for him in such Case, in any place within England; 5. It is not shewed, that they of Salisbury have a corporation, so as they might be enabled to prescribe, 6. The wounding is not answered, for moliter injicere manus cannot be taken for a wounding, it may well answer the battery, &c. Fleetwood Recorder of London, if the Statute of Magna charta should be observed, no Fellon is duly handled at Newgate, and here we have not pleaded by way of Prescription, but of usage, consuetudo and usage are all one, and afterwards Judgement was given for the Plaintiffs, for the Plea in Bar was holden to be naught, because the wounding is not answered; and the Custome is too generall, and also for the fourth exception.

Impriſon not good.

Pasch. 30. *Eliz.* In the Kings Bench.

CXLIV. Sir *Julius Cæsars* Case.

FLeetwood came to the Bar and shewed, that Julius Cæsar Judge of the Admiralty had libelled against the Officer of the Mayor of London, Symon Nicholas, for measuring of Coales at Wiggins Key, in the Parish of Saint Dunstan in the East, and it was upon the Thames, and prayed a prohibition because such measuring of Coals had alwayes appertained to the Mayor of London; for the Statute of 28 H. 8. 15. gave Jurisdiction to the Admiralty in case of robbery and murder: And that prohibition was grounded upon the Statutes of 13. & 15 R. 2. 2 H. 4. 11. And it was said, that this measuring whereof, &c. was in the body of the County; And note, that the said Julius Cæsar, being Judge of the Admiralty had put in this Bill, ex officio judicis, upon which it was said by Wray Justice, that it was hard that he should be both Plaintiff and Judge, and that his Jurisdiction should be tryed before himselfe, and afterwards, it was moved by Egerton Solicitor, who said he had spoken with the Lord Admirall who told him that the Mayor of London used to take a Fine for measurage, and had made an office of it, and that he conceived, the same is extortion, and being made upon the water, he conceived he is punishable in this Court, for by the same reason, the Mayor might take a Fine for the measuring of Corne, Cloathes, &c. Wray and

Gawdy Justice, if it be extortion in the Mayor, there is no remedy for it in the Court of Admiralty: But in the Kings Court. Gawdy; It shall be redressed here in a quo warranto.

Pasch. 30. *Eliz.* in the Kings Bench.

The Towne of Green in Sussex was amerced for the escape of a Felon, and the said Amercement was grounded upon an inquisition taken before the Coroner, by whom the escape was found, and it was moved for the Towne, that here is not any such escape found, for which the Towne ought to be amerced, for it is found, that he who escaped, 10. die Januarij, 30. Eliz. circa horam quartam post meridiem, with a Pitchfork mortally struck one A, which A of the said stroak dyed at eight in the Evening of the same day, and that then the other escaped, for which escape being made in the Night, the Towne by the Law ought not to be amerced, for it is not Fellony, untill the party dyeth, which see 11 H. 4. and Coles Case, Pasch. 23. Eliz. 401. And therefore the Towne nor any other was chargeable with the offendor before that the party was dead. Wray, it should be hard, that the Towne should be amerced upon this matter, for although the Towne in discretion might have stayed the offendor before the death of the party, yet it is not bound so to doe: And the Court took time to advise of the Case. Amercement. Escape.

Pasch. 30. *Eliz.* In the Kings Bench.

CXLVI. Jerom *and* Knights *Case.*

Joan Jerom brought an Action upon the Case in the nature of Conspiracy against one Knight, and declared, that the said Knight had malitiously caused the Plaintiff to be endicted of Felony, and to be arrayned upon it, and that she was legitimo modo acquietat. &c. And the Case was, that the Defendant came into the Court where the Sessions was holden, and complained of the Plaintiff for the said Felony, for which the Justices there commanded her to cause an Indictment to be drawn, &c. Coke upon the Books of 27 H. 6. 12. 35 H. 6. 14. 27 H. 8. 2. Fitz. 115. It appeareth, that if one come voluntarily into the Court and discover Felonies, and it be true which he saith, or if he come in Court and draw an Indictment by the command of the Justices, or if he be bound by order of Law, to cause the party to be Indicted, or to give in Evidence although he doe it falsely, yet he shall not be punished for the same in Conspiracy, or in an Action upon the Case; But if he come gratis with malice in him before, and maliciously and falsely cause the party to be Indicted, so as falsity and malice are the ground of it, &c. it is otherwise; Gawdy Justice, how shall it be tryed, if he doth it with malice or not? Coke, malice may be enquired of, for malice makes the difference betwixt Murder and Manslaughter; and in such case it is to be enquired, and here he came in to doe the same without Process or coersion in Law; But if he will safely doe such office, his direct course is to come to a Justice of Peace, and to shew to him, that his goods are stolen, and that he doth suspect such a one, and then upon examination he shall be bound to come and give in Evidence against the party, &c. & in such case although that his Evidence be false, yet he is not punishable: At another day, it was said by Coke in the same case, ut supra, if a man be bound to give Evidence against any person, although he give false Evidence, no Action lyeth: Also if one come into Court gratis, and discloseth a Felony, and gives Evidence if no malice proceed against the party, it is not punishable, and here fore-thought malice is alleadged, and put in the Declaration, to which the Defendant hath pleaded not guilty; And now he is found guilty. See the Statute of Westminster, 2. Cap. 12. Si inveniatur per inquisitionem Conspiracy.

quod aliquis sit abbettator per malitiam, &c. Wray Justice, it should be hard to charge one with this Action, where he hath his goods stolen from him, and therefore causeth an Indictment to be drawn against one who he suspects of it, who shall be found guilty, who should be punished for it, for many Malefactors notwithstanding that the Evidence against them be full and pregnant, in favour of life are acquitted, whereas by Law they ought to be hanged, and it is not reason, that upon such an acquittall of grace and mercy, he should have this Action, if such person had used any words of malice before the Sessions, an Action upon the case would have layen: And afterwards Judgement was given for the Plaintiff, Trin. 27. Eliz. 750. Ratford, and afterwards a Writ of Error was brought, Trin. 29. Eliz. Rot. 669. In the Originall Action the Writ and Declaration were that the Defendant, malitiose intendens querentem in nomine, vita, fama, & bonis defraudare quandam Billam Indictamenti scribi fecit, & eam exhibuit, to the grand Enquest, & ibidem false deposuit omnia in ea contenta esse vera, which by Coke is full matter of conspiracy, for the drawing of an Indictment is not the office of a witnesse, but if it were by the commandment of the Court, or of one Justice of Peace, it should be otherwise, for there he goes by course of Justice, 21 E. 3. 17. If one conspire with another, and afterwards he procures himselfe to be one of the Indictors, his oath shall not excuse his malice before. Gawdy, if the party had taken upon him to proceed against the party upon any good presumptions, he might have pleaded it, as to say, he found the party in the house suspiciously, &c. but because he doth not plead any such matter, but generally not guilty, and the Writ and Declaration stand not answered specially, nor controlled with the Verdict, there is no reason but that the Judgement should be affirmed; And afterwards, the Judgement was affirmed, and it was said by Wray, that here the words in the Writ and Declaration are all one as the words in a Writ of conspiracy, and the Defendant hath not shewed any speciall matter to enduce him to the proceedings.

Upon an Acquitall of Grace, no Conspiracy lieth.

Pasch. 30. *Eliz.* in the Kings Bench.

CXLVII. Ferrers *Case*.

HUmphry Ferrers brought an Action upon the case, and declared, that he is seised of an ancient messuage in the Town of Tamworth, and that he and all his Ancestors, whose heire he is, owners of the Messuage, &c. have used time out of mind, &c. to erect Yerdells, in aperta platea of Tamworth, juxta Messuagium predict. every Market day, to make Penns there for Sheep, and that he, &c. have used for such penning of Sheep, there to take diverse sums of money of such persons who would Penn their Sheep there, and further declared, that the Defendant had broken and pulled down his Yerdels, per quod proficuum suum inde amisit; And upon this Declaration, Godfrey did demur in Law, 1. the Plaintiff hath not shewed in his Declaration, specially where he hath used to erect his Yerdells, but generally, in aperta platea, without shewing in his own Land, or in the Land of another, if in the Land of another, it is no good title, for although that those who fish in the Sea may prescribe to set Stakes on the Land adjoyning to the Sea, to hange their Nets to dry after they have done Fishing, and that is through the whole County of Kent, 8 E. 4. for their prescription is for the common Wealth, but the same is not so here, but only for a private gaine, also no prescription is good, but where some profit comes to him who prescribes for it, which see in the case of the Abbot of Buckfast, 21 E. 4. 4. 21 H. 7. 20. Also the Declaration is, that the Plaintiff hath taken, diversas denariorum summas, and see the Prior of Dunstables case,

Prescription.

11 H.

11 H. 6. 19. 19 R. 2. Action sur le Case 51. But the certainty of the sums do not appear in this Declaration, so as the reasonablenesse of the custome might be known, also it appeareth here upon the Declaration, that Trespasse, vi & armis, should lye and be brought, for the Declaration is, that the Defendant did break and pull down the Herdells which cannot be without expresse force, as 42 E. 3. 24. Trespasse upon the case against a Miller, and declared that the Plaintiff used to grind at the said Mill without Toll, and that he sent his corne to the said Mill to be grinded, and there the Defendant came and took two Bushels of his said corne; And the Writ was upon the prescription to grind sine multura, and that the Defendant, predict. querent. sine multura molere impedivit, and by Award of the Court the Plaintiff took nothing by his Writ, for he hath declared that the Defendant hath taken Toll, and therefore he ought to have a generall Writ of Trespasse: Beaumont, to the contrary; A Market is as well for the common Wealth as a Fishing: Also he is at the costs for providing of Herdells, and the erecting of them, so (as he hath declared) he hath taken diverse sums of money for it, and as to any sum not certaine, it is well enough, for peradventure sometimes he hath taken a penny, sometimes two pence, as the parties could agree: And as to the exception of vi & armis, the same is not materiall, for the Plaintiff doth not relye upon the pulling down of the Herdells only, but upon the losse of the mony also, which he should have had if the Defendant had not broken his Herdells: And afterwards Judgement was given for the Plaintiff.

Pasch. 30. *Eliz.* In the Kings Bench.

CXLVIII. Beverly *and* Bawdes *Case.*

Error.

BEverly brought a Writ of Error to reverse an Outlawry pronounced against him at the suit of one Bawdes, and shewed, that he was outlawed by the name of John Beverly of Humby in the County of Lincolne Gent. And that within the said County, there are two Humbyes, scil. Magna Humby, & parta Humby, and more without addition; To which it was said, of the other side, that the truth is that there are two such Townes, and that Humby Magna is known as well by the name of Humby only, as taken for the name of Humby Magna: And upon that they are at Issue: And it was moved, if the Inquest to try this Issue shall come de corpore comitatus, or from Humby magna. And by Cook, it shall be tryed by an Inquest of Humby Magna; and he confessed, that if the Issue had been, No such Town; then the Inquest ought to be of the body of the County, but here is another Issue to be tryed, 22 E 4. 4. In Trespasse done in Fulborn and Hinton in the County of C. The Defendant said, that there is no such Town nor Hamlet of Hinton within the same County. Judgement of the Writ. See there by Briggs the tryal shall be, de corpore comitatus. See 14 H 6. 8. Over-dale and Nether-dale, and none without addition, and so at Issue tryed by them of the body of the County, 35 H 6. 12. And by him, whersoever an Issue may be tryed by an Inquest out of a special Visor, there it shall never be tryed by the body of the County. As the case before, 22 E 4. Trespasse in two Townes A and B. The Defendant as to A plead, there was no such Town, and as to B pleaded another plea. Now the whole Inquest shall come out of B; for the Inquest in one Town may try any thing within the same County, which see Fitz. Visne, 27. 22 E 4. 4. And here in our case the Issue is, if Humby Magna be as well known by the name of Humby only, as by the name of Humby Magna. And therefore the same may well be tryed by Inquest out of the Town of Humby Magna. But by Wray Justice, this Issue doth amount to no such Town, for the perclose of the plea is, and no Humby without addition, and the book cited out of 22 E 4. is not ruled, but

Tryal by Inquest of what County or place.

is only the opinion of Brian. And afterwards it was awarded, that the tryal was well: Another matter was objected, because it is not shewed in the Writ of Error, betwixt what parties the first Writ did depend, for otherwise how can the Plaintiff in the Writ of Error have a Scire facias ad audiendum Errores, if none be named in the Writ of Error against whom it shall Issue. And Godfrey affirmed, that upon search of Presidents it was both wayes, so as it is at the pleasure of the Plaintiff to do it or not. And Kemp Secondary shewed divers Presidents to that purpose: And afterwards the Outlawry was reversed.

Pasch. 30. *Eliz.* In the Common Pleas.

CXLIX. Cibel *and* Hills *Case.*

Debt for a *Nomine pœnæ.*

A Lease was made of a certain House and Land rendring Rent, and another sum, Nomine penæ; and for the Nomine penæ the Lessor brought an Action of Debt: The Lessee pleaded, that the Lessor had entred into parcel of the Land demised, upon which they were at Issue, and found for the Plaintiff: and now the Lessor brought Debt for the Rent reserved upon the same Lease: To which the Defendant pleaded, ut supra, scil. an Entry into parcel of the Land demised: And issue was joyned upon it; And one of the Jury was challenged, and drawn, because he was one of the former Jury: And the Issue now was, whether the said Cibell the Lessor, expulit & amovit & adhuc extra tenet, the said Hills. And to prove the same, it was given in Evidence on the Defendants part, that upon the Land demised there was a Brick-kill, and thereupon a little small cottage, and that the Lessor entred, and went to the said cottage and took some of the Bricks and untiled the said cottage: But of the other side it was said, that the Lessor had reserved to himself the Bricks and Tyles aforesaid, which in truth were there ready made at the time of the Lease made, and that he did not untile the Brick-kill house, but that it fell by tempest, and so the Plaintiff did nothing but came upon the Land to carry away his own goods: And also he had used the said Bricks and Tyles upon the repairation of the house. And as to the Extra tenet, which is parcel of the Issue, the Lessor did not continue upon the Land, but went off it, and relinquished the possession: But as to this last point, it seemed to the Court, that it is not material if the Plaintiff continued his possession there or not, for if

Suspension of Rent by entry upon part of the Land.

once he doth any thing which amounts to an Entry, although that he depart presently, yet the possession is in him sufficient to suspend the Rent, and he shall be said, extra tenere, the Defendant the Lessee, untill he hath done an Act which doth amount to a Re-entry. And afterwards to prove a Re-entry, it was given in Evidence on the Plaintiffs part, that the Defendant put in his Cattel in the Feild where the Brick-kill was, and that the Cattel did estray into the place where the Defendant had supposed that the Plaintiff had entred. And by Anderson Justice, the same is not any Re-entry to revive the Rent, because they were not put into the same place by the Lessee himself, but went there of their own accord. And such also was the opinion of Justice Periam.

CL. *Pasch.* 30. *Eliz.* in the Common Pleas.

TEnant in tail covenanted with his Son to stand seised to the use of himself for life, and afterwards to the use of his Son in tail, the Remainder to the right Heires of the Father: The Father levyed a Fine with proclamations and dyed. It was moved by Fenner, if any estate passed to the Son by the

the Covenant, for it is not a discontinuance, and so nothing passed but during his life, and all the estates which are to begin after his death are void. Anderson, the estate passeth until, &c. and he cited the case of one Pitts, where it was adjudged, that if Tenant in tail of an Advowson in grosse grant the same in Fee, and an Ancestor collateral releaseth with warranty and dyeth: That the same is a good Barre for ever.

Pasch. 30. *Eliz.* in the Common Pleas.

CLI. Staffords Case.

THe case was, that the Parson of the Church of B did libel in the Ecclesiastical Court for the Tyth-milk of eight Kine depasturing within such a Feild within his Parish: The Defendant said, that he and all those, &c. had used time out of mind, &c. to pay every year a certain sum of mony to the Parson, &c. for the tythes of the same feild; which plea the Judges of the Ecclesiastical Court would not allow, and therefore the party had now a Prohibition and an Injunction against the Judges, Doctors, Proctors, &c. And afterwards the same Parson libelled again for the same Tythes against the same Parishioner; and in both Libels there was no difference, but that in the later Libel it was for a lesse number of Kine, and now the Parishioner upon this matter prayed an Attachment upon the Prohibition, which was granted unto him by the Court, for otherwise a Prohibition should be granted to no purpose.

Attachment upon a Prohibition.

Pasch. 30. *Eliz.* in the Common Pleas.

CLII. Samford *and* Wards *Case.*

SAmford brought a Ravishment of Ward against Ward, and counted, that one A Ancestor of the Infant, whose Heir he is, was seised of certain Lands in Fee, and held the same of the Bishop of Winchester in Socage, and dyed, his Heir within the age of fourteen years; and that the custody of the Infant did belong unto him as his prochin Amy; by force of which he seised him and was possessed, &c. The Defendant saith, that the Land was holden of him by Knights service, absque hoc, that it is holden of the Bishop of Winchester as the Plaintiff hath counted. And upon that Issue was joyned. And it was moved by Serjeant Puckering on the Plaintiffs part, that the truth of the Case was, that all the Land descended is holden in Socage, and no part in Knights service, but that part of it is holden of another in Socage: And prayed the opinion of the Court, if that matter shall trench to the Issue as the same is joyned: And the Court was of opinion, that it did not: for if all be holden in Socage, it is not material if part of it be holden of another, so as it be holden in Socage.

Ravishment of Ward.

Pasch. 30. *Eliz.* in the Common Pleas.

CLIII. Stampe *and* Hutchins *Case.*

THe Case was, the Obligor makes his Executors and dyeth; the Executors become bounden to the Obligee for the payment of the said debt, and the Obligee doth deliver back the Obligation of the Testator to them; and afterwards another Creditor of the Testator sues the Executors, who pleaded, that they have fully administred, upon which they are at issue, and the said especial

especial matter was found by verdict. And by Shutleworth and Walmesley: The Jury have found for the Plaintiff, and that the Defendants have not fully administred: And yet they agreed the case of 20 H 7. 2. The Executors paying to the Creditors of the Testator a Debt with their own goods, they may retain so much of the goods of the Testator; but that case is not like to this, for here the Executors have not made any payment or satisfaction of the Debt, nor disbursed any money, &c. nor other things, but only have made an Obligation, to pay a sum of money at a day to come, before which day it may happen that the Obligation be cancelled or released; but it may more fitly be compared to the case 27 H 8. 6. where an Executor had compounded with a Creditor of the Testator for the payment of twenty pounds for a debt of forty pounds, and had an Acquittance testifying the payment of the forty pounds, where it was holden, that the other twenty pounds is Assets. And by Rhodes, this making of an Obligation by Executors, (although the Obligation, in which the Testator was bounden, be delivered to the Executors and cancelled) is not any administration nor payment of the said debt due: So if the Executors pledge the goods for the payment of such a debt, yet they shall be accounted Assets until payment be made, which Periam denied. And Periam and all the other Justices held clearly, that if in such case the Executors make a sufficient Obligation to the Creditor of the Testator, and sufficiently discharge the Testator without fraud or covin, that they may retain the goods of the Testator for so much: and the goods retained shall not be said Assets: And this case is all one with the case 20 H 7. for here they have discharged the Testator, and the Executors do remain charged with the same to the Creditor, and it is so fully administred, as if the Executors had expressly paid the debt. And it is not like to the case of 27 H 8. cited before, for there, although they have discharged the Testator, yet they have not charged themselves, otherwise it is in the principal case; and although they have appointed, ulteriorem diem, for the payment of the said debt, yet the same is not material: But the Lord Anderson conceived, that if the Creditor doth deliver unto the Executors the Obligation as an Acquittance or discharge, and in consideration thereof they promise to pay the debt, the same is not any administration as to the said debt. And by some of the Serjeants, If the plea stands good to prove fully administred, then Executors in such case may make an Obligation to pay the debt forty yeares after, and so defraud the other Creditors, which is not reasonable: If a Feoffment in Fee be made upon condition to pay certain money at such a day, and at the day the Feoffees makes an Obligation to the Feoffor for the payment of it, the same is no performance of the condition. And by Periam, If the Executor be taken in Execution for the debt of the Testator, he may retain so much of the goods of the Testator amounting to the sum for which he is in Execution, & it shall not be accounted Assets in his hands. Anderson, If he to whom the Testator was endebted in twenty pounds, be endebted to the Executors in so much, and the Executor in satisfaction of the debt of the Testator, releaseth his debt, the property shall be altered presently of the whole goods in the hands of the Executors, so where the Debtor makes the Creditor his Executor. And Judgement was given for the Executors.

Administration. Assets.

Retainer by administrators.

Pasch. 30 *Eliz.* in the common Pleas.

CLIV. Beares Case.

Formedon.

A Formedon in the Discender was brought by Samuel Beare, James Beare, and John Beare of Lands in Gavelkind; and the Warranty of their Ancestor was pleaded against them in Barre, upon which they were at Issue.

If

If Aſſets by diſcent. And it was found by ſpecial verdict, that Thomas, Father of the Demandants, was ſeiſed in Fee of the Lands ſuppoſed to be diſcended to the Demandants, being of the nature of Gavel-kind, and deviſed the ſame to the Demandants, being his Heires, by the cuſtom, and to their Heires equally to be divided amongſt them: And if the Demandants ſhall be accounted to be in of the Lands by diſcent, or deviſe, was the queſtion; for if by deviſe, then they ſhall not be Aſſets: Anderſon, Letus conſider the deviſe by it ſelf without the words (equally to be divided amongſt them.) And I conceive, that they ſhall be in by the deviſe, for they are now Joynt-tenants, and the ſurvivor ſhall have the whole, whereas if the Lands ſhall be holden in Law to have diſcended, they ſhould be Parceners, and ſo as it were Tenants in common. And although the words ſubſequents equally amongſt them to be divided makes them Tenants in common, yet that doth not amend the matter; and ſo alſo was the opinion of Windham and Rhodes Juſtices. Deviſe of Lands in Gavel-kind.

Paſch. 30. *Eliz.* in the Kings Bench.

CLV. Naſh *and* Edwards *Caſe.*

IN an Ejectione firmæ by Naſh againſt Edwards, it was found by ſpecial verdict, that one Dover Anceſtor of the Plaintiff, whoſe Heir he is, being ſeiſed of certain Lands holden in Socage, deviſed the ſame by word to his three ſiſters; And a ſtranger being preſent recited to the Deviſor the ſaid words of his Will, and he did affirm them. And afterwards the ſaid ſtranger put the ſaid words in writing for his own remembrance, but did not read them to the Deviſor, who afterwards dyed. And it was moved, If this deviſe being reduced in writing, modo & forma, be good or not. Spurling conceived that not, for the Statute intends a Will in writing, but not ſuch writing as is here without privity or direction of the Deviſor, and it is not like to the caſe of Brown and Sackvill, 5 Ma. Dyer 37. For the Notes were written by the commandment of the Deviſor, but here it doth not appear that the meaning of the Deviſor was, that the deviſe ſhould be put in writing: And deviſes in Law are favoured, as the caſe in the Chancery was, that Sir Richard Pexhall deviſed certain Lands to his Wife, and the Scrivener inſerted of his own head a condition, ſcil. (that ſhe ſhould be chaſt) which was diſallowed by the Deviſor himſelf, for which after his death, the condition, although it was put in writing, was void. And by the whole Court the deviſe is void. And by Wray, if he apponit A to write his Will, and it is written by B, it is void; but if after he had written the Will if he had read it to the Deviſor, and he had confirmed it, it had been a good Will, which Gawdy granted: And afterwards Judgement was given, that the Plaintiff ſhould recover. Deviſes.

Trin. 30. *Eliz. Rot.* 771. In the Kings Bench.

Stone *and* Withypolls *Caſe.*

STone brought an Action upon the Caſe againſt Dorothy Withypoll the Executrix of W. Withypoll her Husband, and declared that where her ſaid Husband for certaine yeards of Velvet of the value of fourteen yards, & pro diverſis alijs mercimonijs, was endebted to the Plaintiff in the ſum of ninety two pounds, and made the Defendant his Executrix and dyed, that after his death he came to the Defendant, and demanded of her the ſaid debt, who gave to him ſuch anſwer, forbeare me untill Michaelmas, and then I will pay it you,

or put you in sufficient security for the true payment thereof: And declared further, that at Michaelmas aforesaid, the Defendant did not pay, nor hath found any security, and shewed a request, to which the Defendant said, that the said Testator at the time of the said Contracts for the Velvets and other Wares, was within age: And upon that Bar the Plaintiff did demur in Law. Egerton Solicitor, for the Plaintiff, as I conceive these Contracts made by the Plaintiff are not meerly void, so that if an Action of Debt, or upon the Case, had been brought against the Testator himselfe, he could not have pleaded upon the matter Nihil debet, or, Non Assumpsit, or, Non est factum, but he ought to avoid the matter by speciall pleading, and therefore here it is a good consideration, & I conceive that if the Testator at his full age had assumed to pay the debt, that that promise would have bound him, 9. Eliz. it was the Case of the Lord Grey, his Father was endebted to diverse Merchants upon simple Contracts, and dyed seised of diverse Lands which discended to his Son and Heire in Fee, the Creditors demanded their debts of the Heir, who answered unto them, if my Father were endebted unto you, I will pay it, and upon that promise an Action was adjudged maintainable, although the Heir by the Law was not chargeable, and also here the Defendant is to have ease, and shall avoid trouble of Suites, for perhaps if shee had not made such promise, the Plaintiff would have sued her presently, which should be a great trouble unto her, and therefore it is a good consideration. Cooke contrary, no consideration can be good, if not, that it touch either the charge of the Plaintiff, or the benefit of the Defendant, and none of them is in our case, for the Plaintiff is not at any charge, for which the Defendant can have any benefit, for it is but the forbearance of the payment of the debt which shee was compellable to pay, and as to the suit of the Chancery, the same cannot make any good consideration, for there is not any matter in the Case, which gives cause of suit in Chancery, for they will not order a matter there which is directly against a Rule and Maxime of the common Law. As if a Feme Covert be bound, &c. and the Obligee bring her into the Chancery, and if a man threaten me, that if I will not pay to him ten pounds, he will sue me in the Chancery, upon which I promise to pay it him, no Action will lye: And an Infant is not chargeable upon any contract, but for his meat, drink, and necessary Apparell, 19 E. 4. 2. And in Debt upon such necessary Contract, the Plaintiff ought to declare specially, so as the whole certainty may appear upon which the Court may judge, if the expense were necessary and convenient or not, and upon the reasonableness of the price, for otherwise, if the necessity of the thing, and reasonableness of the price doth not appear, the Chancellor himselfe would not give any remedy, or recompence to the party, Wray Justice conceived, that the Action would not lye, for the contract was void, and the Infant in an Action against him upon it may plead, Nihil debet: And if an Infant sell goods for money and doth not deliver them, but the Vendee takes them, he is a Trespassor, but if the Infant had been bounden in an Obligation with a surety, and afterwards at his full age he in consideration thereof promiseth to keep his surety harmlesse, but upon that promise an Action lyeth, for the Infant cannot plead non est factum, which see Mich. 28. and 29. Eliz. in the Case of one Edmunds: And afterwards it was adjudged against the Plaintiff.

Assumpsit.

Trin. 30. *Eliz. Rot* 932. In the Kings Bench.

CLVII. Charnock *and* Worsleys *Case.*

CHarnock and his Wife brought a Writ of Error against Worsley, the Case was that the Husband and Wife, the Wife being within age levy a Fine, and the Wife upon inspection was adjudged within age, and it was moved

moved, if the Fine should be utterly reversed, or as to the Wife only, and should stand against the Husband, and by Godfrey the Book of 50 E. 3. 6. was vouched where it is said by Chandish, that where such a Fine is reversed, the Plaintiff shall not have execution till after the death of the Husband; and by Coke and Atkinson, a Fine acknowledged by the Husband and Wife, is not like to a Feoffment made by them, for in case of Feoffment something passeth from the Husband, but in case of a Fine all passeth out of the Wife, and the Conusee is in by her only, and Atkinson shewed a President in 2 H. 4. where the Fine was reversed for the whole, and also another President, P. b. H. 8. Rot. 26. A Fine levyed betwixt Richard Elie Plaintiff, and N. Ford, and Jane his Wife Defendants, the Wife being within age, and Judgment was given, quod finis predict. adnulletur, & pro nullo penitus habeatur, and that the Husband and wife should be restored, and thereupon a Writ issued to the Custos Brevium, to bring into Court the Foot of the Fine, and it was presently cancelled in Court, Wray, this is a strong president, and we will not varie from it, if other Presidents are not contrary. Gawdy (who was the same day made Justice) the Fine cannot be reversed as to one, and stand as to the other, and resembled it to the Case of Littleton 150. where Land is given to Husband and Wife in taile before coverture, and the Husband aliens, and takes back an estate to him and his Wife for their lives, they both are remitted, for the Wife cannot be remitted if the Husband be not remitted: And a President was cited to the contrary, 7. Eliz. where the Case was that the Husband and Wife levyed a Fine, the Husband dyed, the Wife being within age the Wife took another Husband, and they brought a Writ of Error, and the Wife by inspection adjudged within age, and the Fine was reversed as to the Wife and her Heirs: And it was argued by Golding, that here the Writ of Error ought to abate, for the Writ is too generall, whereas it ought to be speciall, Ex querela A.B. nobis humillime supplicantis accepimus, &c. See the Book of Entries 278. Also the purclose of the Writ is, ad damnum ipsorum, the Husband and the Wife, whereas the Wife only hath lost by it, and as to the Fine it selfe, he conceived, that it should be reversed but as to the Wife, as if a man of full age, and a man within age, levy a Fine, in a Writ of Error brought, the Fine shall be reversed, as to the Infant only, and shall stand against the other, and he cited the Case of the Lord Mountjoy, 14. Eliz. Where a man seised in the right of his Wife acknowledged a Statute, and afterwards he and his Wife levyed a Fine, and he said that during the life of the Husband, the Conusee of the Fine should hold the Land charged with the Statute: Also in the President of 2 H. 4. the Judgement is, that propter hunc & alios errores, the Fine should be reversed, and I conceive that another Error was in the said Writ, for which the Fine might be reversed in all, viz. the Fine was levyed of two parts of the Manor of D. without saying in tres partes dividend. And see that where two parts are demanded in a Writ, the Writ shall say so, Breif 244. Coke contrary, and as to the last matter I confesse the Law is so in a Writ, but not in a Fine, for the same is but a Conveyance, for if I be seised of a Manor, and I grant to you two parts of the said Manor, it is clear, it shall be intended in three parts to be devided. And as to the principall matter I conceive, when the Fine is levyed by the Husband and Wife, it shall be intended that the Land whereof, &c. is the Inheritance of the Wife, if the contrary be not shewed, and therefore if the party will have an especiall Reversall, he ought to shew the speciall matter, as in Englishes Case: A Fine was levyed by Tenant for life, and he in the reversion being within age, bringeth a Writ of Error, now the Fine shall be reversed as to him in the Reversion, but not as to the Tenant for life, but here it shall be intended the Inheritance of the Wife, and that the Husband hath nothing but in the right of his Wife, and therefore shee shall be restored to the whole, for nothing passeth from the Husband, but he is named with his

Fine reversed as to one, to stand good against another.

Wife only for conformity, 11 H. 7. 19. A takes to Wife an Inheretrix, who is attainted of Felony, the King shall have the Land presently, by which it appearethat all is in the Wife, and shee shall be restored to the whole, and the Judgement shall be according to the two Presidents cited before: And as to the President cited 7. Eliz. the same is not to the purpose, for the second Husband was a stranger to the Fine, for which it should be absurd to reverse the Fine as against him: Egerton Solicitor Generall; Presidents are not so holy, quod violari non debeant, as to be rules to other Judges, in perpetuum, and I conceive that the Fine shall be reversed as to the Wife only, for the Fine is but a Conveyance, and the Husband may lawfully convey the Land of his Wife for his life, and if the Husband alone had levyed the Fine, the same had bounden the Wife during his life, if a woman Lessee for life taketh to Husband him in the Reversion, and they joyne in a Fine, the Wife then being within age, now in a Writ of Error brought thereof, the Fine shall stand as to the Inheritance of the Husband, but shall be reversed as to the Interest of the Wife. Coke, it shall be intended here, all the Interest and estate in the Land to be in the Wife, as 20 H. 7. 1. Where the Husband and Wife are vouched, it shall be intended by reason of the Warranty of the Wife only, and so the Counter-plea shall be of the seisin of the Wife and her Ancestors: Wray, when the Husband and Wife joyne in the Fine, it shall be presumed, the Inheritance of the Wife, and if it be otherwise, it ought to be specially shewed, and as to that which hath been said, that if the Husband alone had levyed a Fine, it should have bounden the Wife during the life of the Husband, the same is true, but such Fine is but a discontinuance, but the right continueth in the Wife, but when the Husband and Wife joyne in the Fine, all passeth out of her, and if the Fine in such case for the Inheritance shall be reversed in all, to whom belongs the Free-hold, and to whom shall he be attendant. Gawdy, 12 H. 7. 1. In a Præcipe quod reddat against three, they vouch severally, the Voucher was not received, and yet they might have severall Causes of Voucher, but the Law presumes they are Joynt-tenants, and have a joynt cause of Voucher, if the contrary be not shewed: And afterwards Judgement was given, quod finis predict. reversetur, and Wray said had conformed with many of the other Justices, who were of the same opinion. Gawdy, the Fine shall be reversed in all, for this is an Error in Law of the Court, F. B. 21. D. For by this Fine the Husband giveth nothing divided from the estate of the Wife, but all passeth from the Wife, and therefore all shall be reversed, and if the Fine should be reversed as to the Wife only, then the Fine levyed now by the Husband alone is a discontinuace, by which the Wife by the common Law shal be put to her Cui in vita, and that is not reason; also we cannot by this Reversall, make the Conusee to have a particular estate during the life of the Wife: And therefore the Fine is to be reversed for the whole, and as void for the whole to the Conusee.

Trin. 30. *Eliz.* in the Kings Bench.

CLVIII. Cage *and* Paxlins *Case.*

DAniel Cage brought an Action of Trespasse against Thomas Paxlin for Trespasse done in a Close of Wood, called the Frith-Close, and in the Parke, and for taking of certain Loads of Wood: The Defendant pleaded, that the Earle of Oxford was seised of the Manor of W. of which the place where, &c. is parcell, and leased the same to J S for yeares, excepting all Woods, great Trees, Timber-trees, and Under-woods, &c. And covenanted

ted with the Lessee and his Assignes, that he might take Hedg-boot, and Fire-boot, super dicta premissa, and shewed further, that the said I S assigned his Interest unto the Defendant, and that he came to the said Close called the Frith-Close, and cut the Wood there for Fire-boot, as it was lawfull for him to doe, &c. And note, that after the Lease aforesaid, the said Earle had assured the Inheritance thereof to Cage the Plaintiff. And it was argued by Godfrey, that the Lessee cannot take Fire-boot in the said Close, for the wood &c. is excepted, and was never demised, and by the exception of the wood, the soile thereof is excepted: See 46 E. 3. 22. A leased for life certain Lands reserving the great wood, by that the soile also is reserved, vi. 33 H. 8. to Reservation, 39. 28 H. 8. 13. And by the words of the Covenant, the intent of the Lessor appeareth, that the Lessee shall have his Fire-boot out of the residue of the Lands demised, for præmissa here is equivolent with prædimissa: And he cited the Case moved by Mountaine cheif Justice, 4. E. 6. in Plowden, in the Case betwixt Dive and Manningham, 66. A. leaseth unto B. a Mannor for yeares, excepting a Close, parcell of it, rendring a Rent, and the Lessee is bounden to performe all Grants, Covenants, and Agreements, contenta & expressa aut recitata, in the Indenture, if the Lessee disturbe the Lessor, upon his occupation of the Close excepted, he hath forfeited his Obligation, &c. But our Case is not like to that. And if I let the Mannor of D. for years, except Green-meadow, and afterwards I covenant that the Lessee shall enjoy the Premisses, the same doth not extend to Green-meadow. Snagg Serjeant to the contrary, and by him præmissa, are not restrained to prædimissa, but to all the Premisses put in the former part of the Indenture of Demise, therefore the Lessee shall have Fire-boot in the one, and the other, and he put a difference betwixt all Woods excepted, and all woods growing excepted, for in the one case the soile passeth, in the other not; And as to the Case cited before in Plowden, 66. that's true, for exception is an Agreement: And he said that by that exception the soile it selfe is excepted, and these woods which are named by name of woods, contrary where a Close containeth part in woods, and part in Pasture; And by the exception of Timber-trees, and Under-woods, all the other woods are excepted, but not the soile: As if a man grant all his Lands in D. Land, Meadow, Pasture, and woods thereby passeth, by exception of this Close of wood, the soile also is excepted, and he conceived, that although all the woods be excepted, yet by the Covenant an Interest passeth to the Lessee, so as he may take Fire-boot without being put to his Action of Covenant: As 21 H. 7. 30. A. leaseth unto B. for life, and Covenants in the Indenture of lease, that he shall be dispunished of Waste, although the same be penned by way of Covenant, yet it is a good matter of Bar being all by one Deed: And afterwards Judgement was given for the Plaintiff, as to that Close of wood called Frith-Close; but as to the Parke, for the Defendant, for the Frith-Close was all excepted, scil. the wood and the soile: And these words, super præmissa, shall be intended such things which were demised, and no other, and by this Covenant, the Lessee hath power to take the wood upon the other Lands, although that the wood be excepted, for the soile was demised, and he shall not be punished in Trespasse, and put to his remedy, by Action of Covenant against the Lessor: And by Wray, there is not any colour against the Plaintiff for the Frith Close, if not that the Defendant had averred, that there is not any wood upon the other Lands not excepted but demised; And this word, Præmissa, doth not extend by construction to this mentioned before, being excepted, but only to the things demised.

Lease of Lands excepting the wood.

Mich.

Trin. 30. *Eliz.* In the Kings Bench.

CLIX. Rivett *and* Rivetts *Case.*

EDmund Rivett brought an Action upon the Case against George Rivett, and declared, that where it was pretended to the Defendant, that one R made his Will, and by the same devised certain Legacies to the Defendant, and the Plaintiff upon that had sued in the Prerogative Court of Canterbury for to disprove the said Will: And if he prosecutus fuisset, he might have disproved the said Will, and so defeated the Defendant of his pretended Legacies: The Defendant in consideration that the Plaintiff, ultra non procederet, did promise to give to the Plaintiff one hundred pounds; and averred, that he had surceased his said sute; And further declared, that licet the Defendant, ad hoc requisitus fuerit tali die & anno, &c. It was moved in arrest of Judgement, that here is not any consideration, for the Defendant hath not any meanes to compell the Plaintiff for to surcease his sute, for there is not any crosse promise set forth in the Declaration; And although that he doth surcease his sute, yet he may begin the same again, and therefore the Plaintiff ought to have shewed in his Declaration a Release or other discharge of it, as the case was 3 Eliz. reported by Bendloe. A was bound unto B in twenty pounds, and afterwards A promised to B, that in consideration the said A should not be damnified by reason of the said Bond, to give the said B ten pounds, and upon that promise B brought an Action upon the Case, and shewed, that the Defendant was not damnified by reason of the said Bond. But it was adjudged, that the Action was not maintainable upon that matter, because that the Plaintiff did not shew in his Declaration, that he had released or otherwise discharged the Defendant of the said Bond, and so no consideration in the case.

Assumpsit.

Another Exception was, because the request is not layed certainly, but generally, licet requisitus, and doth not say by whom he was required, or what thing to do: And afterwards a President was shewed, Trinit. 28. Eliz. rot. 523. betwixt Smith and Smith. An Assumpsit, in consideration that the Plaintiff should not implead the Defendant upon Bond: And the Plaintiff had Judgement to recove. And as to the request it was said by Kempe, that there are many Presidents, that a Request generally levyed is sufficient: And afterwards in the principal Case Judgement was given for the Plaintiff.

Request.

Trin. 30. *Eliz.* In the Kings Bench.

CXL. Wheeler *and* Twogoods *Case.*

WHeeler brought an Ejectione firmæ against Twogood, and it was found by special verdict, that the Earl of Oxford was seised of the Mannor of Hornely, in which were divers Copy-holds: And that the said Earl leased the said Mannor to one Heywood for one and twenty yeares, to begin two yeares after. Except all casualties and profits of Courts, which severally did not passe the value of six shillings eight pence. And afterwards the Earl bargained and sold the Reversion to Anthony Cage: And afterwards a composition was made betwixt Anthony Cage and the Lessee, by which the Lessee did grant and covenant to & with the said A Cage, that he would permit the said Anthony Cage peaceably to hold the Courts and to take the profits to his own use, Proviso, that the said Lessee should have the Rents of the Copy-holders and Free-holders: And afterwards the Lessee granted over his Interest in the said

said Term. It was moved by Towle, that by this Exception the Court Baron is not excepted nor severed from the Mannor, nor destroyed, for it is incident to the Mannor, and this Covenant betwixt the Lessee and Anthony Cage amounts to a grant of the Court to Anthony Cage. See 44 E 3. Fitz. Mannors de faits 144. and 29 E 3. Burr. 280. and see 37 H 8. and 1 E 6. Br. Leases 60. That where I S Covenants, & concessit to I N, that he shall have twenty acres of Land in B for one and twenty yeares, it is a good Lease, for this word concessit is as strong as dimisit. And it was moved, that here the Earl leased for yeares to begin two yeares after, and the Lessee being in possession, doth continue it after the two years, and afterwards before any entry the Lessee assignes over his Interest, that the same is not a good grant, but only a Right: But by the whole Court the grant was holden good, notwithstanding the said Exception: And it was holden also, that the Covenant (ut supra) was void, for although that Anthony Cage hath authority to hold the Courts, yet it ought to be in the name of the Lessee.

Covenant amounts to a grant.

Trin. 30. *Eliz.* in the Kings Bench.

CLXI. Stretton *and* Taylors *Case.*

STretton did informe against Taylor upon the Statute of Usury: Qui sequitur tam pro Domina Regina, quam pro seipso: And the Queens Attorney entred upon it, &c. non vult prosequi, and that was pleaded in Bar against the Informer for the whole: And by Wray, the same is not any Barre to the Informer, But Popham the Attorney general said, that by the favour of the Court he would maintain the authority of his place, which his Predecessors had enjoyed, for he said, it cannot be found by any Record in this Court, Common Pleas, or the Exchequer, that the Informer had proceeded where the Attorney General had made such an Entry, for we have not used to do it without great consideration, for if the Informer hath ceased to prosecute the Sute two or three Termes, then we used to enter a Non vult prosequi. For it is not reason that the Subject should be molested or attendant so long without just cause, and it is not against Law, that in personal Suits the act of one should prejudice the other: And the Queen is the principal party in this sute, for the Replication shall be made in the name of the Queen only, and not of the Informer: And afterwards by Award of the Court it was ruled, that that Entry by the Attorney is not any Barre, quoad the Informer, so if the Queen be Nonsuit, so the Nonsuit of the Informer is no Barre against the Queen: And Wray said, that such was the opinions of Anderson and Gawdy Justices, &c.

Information upon the Statute of Usury. *Retraxit* by the Queens Attorney shall not bind the Informer.

Trinit. 30. *Eliz.* in the Kings Bench. *Intrat. Hil.* 30. *Eliz.* *Rot.* 10.

CLXII. *The* Queen *against* Lewis, Green, *and others.*

AN Information for the Queen against Lewis, Green, and others: The Case was, King E 6. was seised of the Mannor of Stepneth, and twenty acres of Lands in Stepneth, called Stepneth Marsh, and of another Marsh also called Stepneth Marsh, and granted unto the Lord Wentworth and his Heires the Mannor of Stepneth in the County of Midd. Nec non mariscam in Stepneth, ppel. Stepneth Marsh in com. prædict. nec non omnia terr. & ten. eidem Manerio sive premissis pertinent. And if the twenty acres, called Stepneth Marsh, not parcel of the said Mannor passe, or not, was the Question: Cook, that

Grants of the King.

that they shall passe: Here this grant doth consist of three parts; 1. The grant of the Mannor; 2. Nec non mariscum in Stepneth; 3. Nec non omnia, terras & tenementa dicto Manerio sive præmissis pertinen. And by the second clause these twenty acres shall passe, be the same parcel or not, and the latter words cannot referre to that, for it is certainly expressed before. And the case lately agreed in the Court of Wards betwixt Bronkor and Robotham was cited, which was, That the King being seised of the Mannor of Sandridge and Newnam, parcel of the possessions of the Monastery of Saint Albans, and part of the Mannor of Newnam extended into the Parish of Sandridge, and the King granted the Mannor of Sandrige, nec non omnia, terras & tenementa sua in Sandridge, dicto nuper Monasterio pertinen. nec non omnia, terras & tenementa sua dicto Manerio de Sandridge pertinen. By which grant, although that the latter clause doth restrain it to the Mannor of Sandridge, yet the general words of the second clause shall extend to make passe all the whole Mannor of Newnam, which extended into the Parish of Sandridge, and a Decree was in the said Court accordingly.

At another day the case was argued, and the case put to be thus. King E 6. was seised of the Mannor of Hackney and Stepneth in the County of Midd. within which was a great Marsh, called Stepneth Marsh, parcel of the Mannor of Stepneth, which the King had by exchange of the Bishop of London, and there were also twenty acres of Lands which were lying in Stepneth Marsh, and were known by the name of Stepney Marsh, late parcel of the possessions of the Priory of Grace, and granted unto the Lord Wentworth and his Heirs, Dominia sive Maneria sua de Hackney & Stepney, nec non mariscos suos de Stepney in Stepney prædict. nec non omnia Maneria terras & tenem. & mariscos dictis Maneriis aut cæteris præmissis pertinen. If these twenty acres passe in the general words in the first Nec non, or if the words in the second Nec non (dictis Maneriis pertinen.) doth restrein the generality of the first words, was the question: And by Phillips the twenty acres doe not passe, for the grant of the King shall be alwayes taken to a common intent: And because here the King hath these Marshes by several titles, that Marsh only shall passe, which by general entendment shall be intended to passe, scil. the great Marsh, which was in truth parcel of the Mannor of Stepney, and not the twenty acres which the King hath by a special title, although that, ex vi termini, the grant may extend unto it: Also the grant of the King shall be taken, secundum intentionem Regis, and not in deceptionem; and here it appeareth, that the intent of the King was not, that these twenty acres should passe, i. the King grants Maneria sua & terras, and all Lands, &c. iisdem pertinen. but it is not part of any thing pertinen. to those twenty acres, therefore his intent was not to passe them. Secondly, the grant is to have them as fully as the Bishop of London had them, without mentioning of the Prior. Thirdly, as fully as the Bishop had granted them to us, but the Bishop had not granted these twenty acres to to the King. Fourthly, in the Letters Pattents the King recites the value of the Mannor of Hackney and Stepney, but no value of the twenty acres, (Quære, what difference there is betwixt Stepney Marsh & the Marsh of Stepney.) As to the first, the grant is, iisdem & ita præmissis pertinen. which word præmissis includes the præmisses or otherwise should be void: Secondly, the words as the Bishop had, and as amplie as we have from the Bishop are surplusage, and nihil operatur by them. And if the King had not the same of the Bishop it is not material, but they shall passe notwithstanding, because by a special name: As if the King grants to me Manerium de Dale, quod a nobis nuper concelat. fuit, and in truth it was not concealed, yet it shall passe by his special name: But if the grant had been; Proviso, that if the said Mannor were concealed, &c. the same had been good, for it is good by way of Proviso, but not by reference. As to the valuation the same is not material, for who can restrein the bounty of the King. 29 E 3. 7, and 8. The King granted omnes Advocationes pertinen.

Grants of the King taken according to his intent.

pertinend.to such a Priory, quas nuper concessimus patri, of the Patentee, although the King had not ever made such a grant, yet it is a good grant to the Sons, causa qua supra. Gawdy Justice conceived, that the twenty acres did passe, and he confessed the case betwixt Bronkor and Robotham to be good Law,for there the intention is fully, that all appertaining to the Monastery, whether it were parcel of the Manor of Newnam or of Sandridge,passeth, 6 E 6. 8. Dyer. A man leaseth all his Meadows in A containing ten acres, wherein in truth they are twenty acres,all passeth,&c. And if the King grant the Manor of D to A; and further saith, Damus & concedimus, so freely as I S had it,and I S never had it, yet the grant is good: And as to the misrecital of the value, the same is helped by the Statute. Clench Justice to the same intent; and the Jury hath found, that the twenty acres are parcel of Stepney Marsh. Wray to the same intent, against expresse words no favour shall be given to the King. And note, that the Marshes pertaining to the Manor are in the third clause,ergo,the Marsh in the second clause shall be intended a Marsh in gresse, or otherwise it should be idle. And afterwards Judgement was given against the Queen.

Trin. 30. *El.* In the Kings Bench.

CLXIII. Piers *and* Leversuchs *case* In *Ejectione firmæ.*

IT was found by special verdict, that one Robert Leversuch Grand-father of the Defendant, was Tenant in tail of certain Lands, whereof, &c. and made a Lease for yeares to one Pur. who assigned it over to P father of the Plaintiff. Robert Liversuch died: W his Son and Heir entred upon P,who re-entred. W demised without other words the Land to the said P for life, the remainder to Joan his Wife for life, the remainder to the Son of P for life with warranty, and made a Letter of Attorney therein to enter and deliver seisin accordingly. P dyed before that the Livery was executed, and afterwards the Attorney made livery to Joan. W dyed; Ed. his Son and Heir entred upon the Wife,she re-entred, and leased to the Plaintiff, who upon an ouster brought the Action. Heale. When P entred upon W Leversuch the issue in tail,he was a disseisor, and by his death the Land descending to his Heir,the entry of W Liversuch, the issue in tail,was taken away: Cook contrary. P by his entry was not a disseisor,but at the Election of W,for when P accepted such a deed from W,it appeareth that his intent was not to enter as a disseisor; and it is not found that the said P had any Son and Heir at the time of his death, and if not, then no discent; and there is not any disseisin found that P. expulit Leversuch out of the Land. And Judgement was given against the Plaintiff. And Cook cited a Case which was adjudged in the Common Pleas, and it was the Case of Shipwith, Grand-father,Tenant in tail, Father and Son; The Grand-father dyed, the Father entred and paid the Rent to the Lessor, and dyed in possession, and adjudged, that it was not any discent, for the paying of the Rent doth explain by what title he entred, and so he shall not be a Disseisor but at the Election of another.

Trin. 30. *Eliz.* in the Kings Bench.

CLXIV. Severn *and* Clerkes *Case.*

Agreements.

THe Case was, that A by his Deed Poll recited, That (whereas he was) possessed of certain Lands for yeares of a certain Term. By good and lawful conveyance he assigned the same to I S, with divers Covenants, Articles and Agreements in the said deed contained, which are or ought to be performed on his part. It was moved, if this recital (whereas he was) be an Article or Agreement within the meaning of the condition of the said Obligation, which was given to perform, &c. Gawdy conceived, that it is an agreement: For in such case I agree, that I am possessed of it, for every thing contained in the deed is an Agreement, and not only that which I am bound to perform: As if I recite by my deed, that I am possessed of such an interest in certain Land, and assign it over by the same deed, and thereby covenant to perform all Agreements in the deed, if I be not possessed of such Interest, the covenant is broken. And it was moved, if that recital be within these words of the condition (which are or ought to be performed on my part.) And some were of opinion, that it is not within those words; for that extends only in futurum, but this recital is of a thing past, or at the least present.

Recital.

Clench. Recital of it self is nothing, but being joyned and considered with the rest of the deed it is material, as here, for against this recital he cannot say that he hath not any thing in the Term. And at the length, it was clearly resolved, that if the party had not that Interest by a good and lawful conveyance the Obligation was forfeited.

Trin. 30. *Eliz.* in the Kings Bench.

CLXV. Page *and* Jourdens *Case.*

Trespass.

IN Trespasse betwixt Page and Jourden the case was: A Woman Tenant in tail took a Husband, who made a Feoffment in Fee and dyed. The Wife without any Entry made a Lease for years: It was moved, that the making of this Lease is an Entry in Law. As if A make a Lease for years of the Land of B, who enters by force of that Lease, now the Lessor without any Entry is a Disseisor. And it was resolved, that by that Lease, that the Free-hold is not reduced without an Entry.

A general entry amounts to a disseisin.

Trin. 30. *Eliz.* in the Kings Bench.

CLXVI. Havithlome *and* Harvies *Case.*

Action upon the Statute of 5 Eliz. cap. 9.

HAvithlome brought an Action upon the Statute of 5 Eliz. cap. 9. against Harvie and his Wife for the penalty of ten pounds given by the said Statute against him who was served with process, ad testificandum, &c. and doth not appear, not having any impediment, &c. and shewed that process was served upon the Defendants Wife, and sufficient charges, having regard to her degree and the distance of the place, &c. tendred to her, and yet she did not appear. And it was found for the Plaintiff. It was moved in arrest of Judgement, that the Declaration is not good, because the Plaintiff in setting forth that he was damaged for the not appearance of the Wife according to the process, hath not shewed how damnified: Also it was moved, that a Feme Covert

Covert is not within the ſaid Statute, for no mention is made of a Feme Covert, and therefore upon the Statute of West, 2 cap. 25. If a Feme Covert fail of her Record, ſhe ſhall not be holden diſſeiſtreſſe, nor impriſoned. Alſo here the Declaration is, that the Plaintiff tendered the charges to the Wife, where he ought to have tendered the ſame to the Husband.

To theſe three Exceptions it was anſwered. 1. That although the party be not at all damnified, yet the penalty is forfeited. 2. Feme Coverts are within the ſaid Statute, otherwiſe it ſhould be a great miſcheif, for it might be that ſhe might be the only witneſſe: And Feme Coverts, if they had not been expreſſly excepted, had been within the Statute of 4 H 7. of Fines. 3. The wife ought to appear, therefore the tender ought to be to her: And afterwards Judgement was given for the Plaintiff.

Paſch. 30. *Eliz.* in the Kings Bench.

CLXVII. Dellaby *and* Haſſals *Caſe.*

IN an Action upon the Caſe, the Plaintiff declared that the Defendant in conſideration that he had retained the Plaintiff to go from London to Paris to Merchandize diverſe goods to the profit of the Defendant, promiſed to give to him ſo much as ſhould content him, and alſo to give him all and every ſum of money which he ſhould expend there in his Affaires, & further declared, that he was contented to have twenty five pounds for his labour, which the Defendant refuſed to pay: And exception was taken to the Declaration, becauſe there is not ſet down any place or time of the notification of his contentment, for the ſame is traverſable: Gawdy, the Iſſue here is, non Aſſumpſit; *Aſſumpſit.* and therefore that matter as out of the Book, Cook: If one aſſume to pay twenty pounds to another upon requeſt, although the Defendant plead, non Aſſumpſit, yet if the place and time of requeſt be not ſhewed, Judgement many times hath been ſtayed, for no Action without a Requeſt, ſo here without notification of his contentment, no Action, therefore he ought to ſhew it: Gawdy, the ground of this Action is the Aſſumpſit, but that cannot be certain without Declaration, and thereof notice ought to be given to make certainty of the duty, but not to enforce the promiſe, but in your caſe, without a Requeſt Aſſumpſit will not lye; But here it being but conveyance, the certainty of the time and place is not neceſſary to be ſhewed, but the generall forme ſhall ſerve, for it is but inducement: As if a man will plead a deviſe of goods to him, and aſſent of the Executors to take them, he need not to ſhew the time and place of the aſſent. Gawdy, at another day, ſaid that Judgement ought to be given for the Plaintiff, the Aſſumpſit is the ground and cauſe of the Action, and the ſhewing of the contentment is only to reduce the Action to certainty: And Judgement was given for the Plaintiff.

Trin. 30. *Eliz.* in the Kings Bench.

CLXVIII. Musket *and* Coles *Caſe*

WIlliam Musket brought an Action upon the Caſe againſt Cole, and declared that in conſideration, that the Plaintiff had payed unto the Defendant forty ſhillings, for the Debt of Symon his Son, the Defendant promiſed to deliver to him, omnes tales billas & Obligationes, in which his Son was bounden to him; which thing he would not doe, and it was found by Verdict for the Plaintiff: And it was moved for ſtay of Judgement, becauſe the Plaintiff had not averred in his Declaration, that the ſaid Defendant had

Averment. Bils or Obligations, in which Simon his Son was bounden to the Defendant, for if there were none, then no damage. And see Onlies Case, 19 Eliz. Dyer 356. D, in consideration that the Plaintiff had expended divers sums of money circa the businesses of the Defendant, promised, &c. Exception was taken to that Declaration by Manwood and Mounson Justices, because it was not shewed, in what businesses certain, and betwixt what persons. Gawdy, The Plaintiff here is not to recover the Bils or Obligations, but damages only, and therefore needeth not to alledge any Bils in certain. And 47 E 3. 3. A covenants with B, to assure unto B and his Heires, omnia, terras & tenementa quas habet, in such Counties, and for not assurance, an Action of Covenant was brought, and the Plaintiff declared, that the Defendant had broken the said Covenant, and that he had required the Defendant to make a Feoffment unto him of all his Lands and Tenements in the said Counties; and the plea was not allowed, for the Land is not in demand, but only damages to be recovered. See also 46 E 3. 4. and 20 E 3. And in the principal case, the Plaintiff hath time enough for the shewing to the Jury what Bils or Obligations for the instructing of the Jury of the damages.

Trin. 30. *Eliz.* in the Kings Bench.

CLXIX. English, *and* Pellitary *and* Smiths *Case.*

Assault and Battery. IN an Action of Trespasse of Assault and Battery and wounding: The Defendants say, that they were Lessees of certain Lands, and the Plaintiff came to the said Lands, and took certain posts which were upon the Lands, and they gently took them from him: S pleaded, that he found the Plaintiff and P contending for the said Posts, and he to part them moliter, put his hands upon the Plaintiff; which is the same, &c. The Plaintiff replyed, De injuriis suis propriis absque tali causa per ipsis P & S allegat. upon which issue was joyned, which was found for the Plaintiff. It was moved in arrest of Judgment, that here was not any issue, for the Plaintiff ought severally to reply to both pleas aforesaid, for here are several Causes of Justification, and his Replication, absque tali causa, doth not answer to both. Cook, This word (Causa) is, nomen Collectivum, which may be referred to every Cause by the Defendants alledged, reddendo singula singulis, and their Justifications are but one matter, and the Defendants might have all joyned in one plea. Wray, both pleas depend upon one matter, but are several causes; for two justifie by reason of their Interest, and the third for the preservation of the Peace. And by him and the whole Court, although it be not a good form of pleading, yet by reasonable construction this word (Cause) shall be referred to every cause, and so the pleading shall be maintained; And afterwards Judgement was given for the Plaintiff.

Nomen Collectivum.

Trinit. 30 *Eliz.* In the Kings Bench. *Intrat. Hill.* 30. *Rot.* 58. *or* 581.

CLXX. Cater *and* Boothes *Case.*

Covenant. IN a Writ of Covenant the Plaintiff declared, that the Defendant by his deed, bearing date the first of October, 28 Eliz. did covenant, that he would do every act and acts at his best endeavour to prove the Will of I S, or otherwise, that he would procure Letters of Administration, by which he might convey such a Term lawfully to the Plaintiff, which he had not none, licet sæpius requisitus, &c. The Defendant pleaded, that he came to Doctor Drury in

into the Court of the Arches, and there offered to prove the Will of the said I S, but because the Wife of the said I S would not swear, that it was the Will of her Husband, they could not be received to prove it; Upon which it was demurred in Law. It was moved by Williams, that the Action doth not lie, for there is no time limitted by the Covenant when the thing should be done by the Defendant, for which he hath time during his life, for as much as it is a collateral thing. See 15 E 4. 31. if there be not a Request before; but admit that the Covenant had been to perform upon request, then the Plaintiff in his Declaration ought to have shewed an expresse request with the place and time of it, for that is traversable. See 33 H 6. 47, 48. 9 E 4. 22. Gawdy, If the Covenant had been expresly to do it upon request, there the request ought to be shewed specially: But when a thing upon the exposition of the Law only is to be done upon Request, such Request alledged generally is good enough. And by Wray, the Covenantor hath not time during his life to perform this Covenant, but he ought to do it upon request within convenient time; but in some case a man shall have time during his life, as where no benefit shall be to any of the parties, as if the condition were to go to Rome: And as to the Request, he conceived, that it ought to be shewed specially and certainly; for it is for the benefit of the Covenantee, for without request, the Action doth not lie which Clench granted. And it was holden by the whole Court, that the barre shall not help the insufficient Declaration: No more, if the Defendant plead, Non Assumpsit, yet the defect in the Declaration of a Request not duly shewed, remaineth. Gawdy, the bringing of the Action is a Request. Clench, a Writ of Debt is a Præcipe, for which there, licet sæpius requisitus, is sufficient, but a Writ of Covenant is not so.

Request.

Trin. 30. *Eliz.* In the Kings Bench.

CLXXI. Piers *and* Hoes *Case.*

IN an Action of Trespasse, it was found by special verdict, that A seised of Land in the right of his Wife, being her Joynture by a former Husband, he and his Wife made a Feoffment to a stranger and his Heires, Habend. to the use of the estranger and his Heires during the life of the Wife only. Shuttleworth, the same is a forfeiture, for if the same Feoffment had been without any use expressed, then it should be to the use of the Feoffor and his Heires, and by consequence a forfeiture; and as the case is here, it is also a forfeiture, for during the life of the Wife the use is expresly to the use of the Feoffee and his Heires, and the remainder of the Fee-simple is to the use of the Feoffor, scil. the Husband and his Heires. Popham, I conceive that here is forfeiture, for here are several limitations, limitation of the estate unto one, and of the use unto another: And the words (for the life of the Wife) do not referre to the estate but to the use, with proximum antecedens; And he resembled the same to the case of Leonard Sturton, in which he was of Counsel. A man granted Lands, Habend. unto the Grantee, to the use of the Grantee, and the Heires of his body; the same is no estate tail in the Grantee, but only an estate for life, for the Limitation of the use cannot extend the estate. Cook contrary. The case is, that A, Wife of one Piers, being Tenant for life of the Joynture of the said Piers, took to Husband Hoe, they both by Deed grant totum suum Messuagium to one Clarke, Habendum to him and his Heires for the life of the Wife only, I conceive, that here is not any forfeiture, for it is but one intire sentence: And if there be a double construction of a deed, that which is most reasonable shall be taken, so as wrong be not done, and therefore these words (for the life of the Wife) shall referre unto both, scil. the estate and the use, and their intent was not to commit a forfeiture, as appeareth by the words of the Deed, for

Trespasse.

Forfeiture.

Construction of Deeds.

for they grant, ſolum meſſuagium, and that was not but for the life of the wife, ad ſolum uſum; of the Feoffee and his Heirs, during the life of the Wife, and violence ſhould be offered to this word (ſolum) if the Feoffee or his Heirs, ſhould have ultra the life of the Wife, and the word (tantum) cannot otherwiſe be expounded, but that the eſtate for life only ſhall paſſe from them: And he cited the Caſe of 34. E. 3. Avowry 258. A gives Lands unto B in taile, and for default of ſuch iſſue, to the uſe of C in taile, rendring Kent, the ſame render ſhall goe to both the eſtates: So a Leaſe for life to A, the remainder to B, to the uſe of C, the ſame uſe goeth out of both the eſtates, and not only out of the Remainder, ſo here upon the ſame reaſon, theſe words, for the life of the wife, ſhall refer to the firſt eſtate, as well as to the uſe; And in ſuch Caſes the rule of Bracton ought to be obſerved, viz. Benignæ faciendæ ſunt interpetationes verborum, ut res magis valeat, quam pereat. As the Caſe in 6 H. 7. 7. in a Ceſſavit, the Plaintiff counted, that the Tenant held by Homage, Fealty, Sute at Court, and certain Kent, and in the doing of the ſervices aforeſaid, the Defendant had ceſſed, and in not doing of Homage and Fealty, a man cannot ceſſe by two yeares; But it was holden that the ſaid Ceſſavit ſhould be referred to ſuch ſervices only, in which one might ceaſe, and that is Sute of Court, and Kent; And if pleadings ſhall have ſuch favourable conſtruction, a multo fortiori, ſhall a deed, 4 E. 3. Waſt 11. A man leaſed for life, and by the ſame deed granted power unto the Leſſee, to take and make his profit of the ſaid Lands, in the beſt manner ſhould ſeem good to him without contradiction of the Leſſor or his Heirs; yet by thoſe words it is not lawfull for him to doe waſt, for there it is ſaid, that in conſtruction of Deeds, we ought to judge according to that intent, which is according to Law and reaſon, and not to that which is againſt reaſon: See 17 E. 3. 7. accordingly, ſo in the principall Caſe, the words in the Deed of Feoffment ſhall be ſo expounded, that the eſtate be ſaved and not deſtroyed.

Regula.

Popham contrary, the Caſes put by Coke are not like to the Caſe in queſtion,; For where the Rent is out of both eſtates, the ſame is but reaſon, for the Rent is in reſpect of the Land, and becauſe he departs with both eſtates, it is reaſon the Rent iſſue out of both, and the like reaſon is of the Caſe of an uſe, for if a man makes a Leaſe for life to A, the Remainder over to B, the ſame ſhall be to their uſe reſpectively, and if he doe expreſſe the uſe, the ſame ſhall be accordingly, and ſhall bind both eſtates, but there Clark hath two eſtates, one by the common Law, and the other by the Statute; But the words ſubſequent (for the life of the wife only) cannot refer to both eſtates: A. gives Lands to one and his Heirs for forty years, the ſame is but a plaine Terme for yeares: But if a Feoffment in Fee be made to one and his Heirs to the uſe of another for forty yeares, there the Fee paſſeth to the Feoffee, and the Terme to Ceſtuy que uſe. Gawdy conceived, that it is not any forfeiture, for theſe words (during the life of the wife only) were put in the Deed to expreſſe the intent of the parties, and therefore the ſame ſhall not be void, and he conceived that they were put in, to exclude the forfeiture, and therefore they ſhall ſerve for that purpoſe. And afterwards it was reſolved by all the Juſtices except Gawdy, that it was a forfeiture, for by the Feoffment the Fee-ſimple paſſeth, and that to the uſe of the Feoffor, and the eſtate, and the uſe are ſeverall things, and the limitation for the life of the Wife cannot extend to both: And as to the Book of 24 H. 8. Br. Forfeiture 87. Tenant for life aliens in Fee to B. Habendum ſibi & hæredibus ſuis, for the Terme of the life of the Tenant for life, the ſame is not a forfeiture, for the whole is but the limitation of the eſtate: And afterwards it was adiudged that it was a forfeiture, Gawdy continuing in his former opinion: And Wray ſaid that he had conferred with the other Judges of their Houſe, and they all held clearly, that it is a forfeiture.

Trin.

Trin. 30. *Eliz.* in the Kings Bēnch. *Rot.* 528.

CLXXII. Toft *and* Tompkins *Case.*

Discontinuance.

UPon a speciall Verdict the case was, that the Grandfather, Tenant for life, the Remainder to the Father in taile, that the Grandfather made a Feoffment in fee to the use of himselfe for life, the Remainder to the Father in Fee; And afterwards they both came upon the Land, and made a Feoffment to Tompkins the Defendant: Coke, there is not any discontinuance upon this matter, for the Father might well have the advantage of the forfeiture committed by the Grand-father, then when the Father joynes with the Grand-father in a Feoffment, the same declares that he came upon the Land, without intent to enter for a forfeiture: It was one Waynmans Case, adjudged in the common Pleas, where the Disseissee cometh upon the Land to deliver a Release to the Disseissor, that the same is no Entry to revert the Land in the Disseissee: Then here it is the Livery of the Tenant for life, and the grant of him in the Remainder, and he in the Remainder here was never seised by force of the taile, and so no discontinuance; Godfrey, here is a Remitter by the Entry, and afterwards a discontinuance, for by the Entry of both, the Law shall adjudge the possession in him who hath right, &c. Gawdy, this is a discontinuance, for when the Father entreth, ut supra, he shall be adjudged in by the forfeiture, and then he hath gained a possession, and so a discontinuance, for both cannot have the possession: Clench, the intent of him in the Remainder when he entred was to joyne with the Grand-father, and when his intent appeareth, that the estate of the Grand-father, and his own also shall passe, that doth declare that he would not enter for the forfeiture: Shute agreed with Gawdy.

Trinit. 30. *Eliz.* in the Kings Bench.

CLXXIII Broake *and* Doughties *Case. Hil.* 31. *Eliz. Rot.* 795.

Action upon the Case for words.

AN Action upon the Case for words, viz. Thou wast forsworne in the Court of Requests, and I will make thee stand upon a Stage for it: It was found for the Plaintiff; It was moved in arrest of Judgement, that the Action will not lye for these words, for he doth not say, that he was there forsworne as Defendant, or witnesse: And Trin. 28. Eliz. betwixt Hern and Hex, thou was forsworne in the Court of Whitchurch; And Judgement given against the Plaintiff, for the words are not Actionable, and as to the residue of the words, I will make thee stand upon the Stage for it, they are not Actionable as it was adjudged between Rylie and Trowgood, if thou hadst Justice thou hadst stood on the Pillory, and Judgement was given against the Plaintiff: Daniel contrary, thou wast forsworne before my Lord cheif Justice in an Evidence, these words are Actionable, for that is perjury upon the matter, and between Foster and Thorne, T. 23. Eliz. Rot. 882. Thou wast falsly forsworne in the Star-Chamber, the Plaintiff had Judgement, for it shall be intended that the Plaintiff was Defendant or a Deponent there: And yet the words in the Declaration are not in the Court of Star-Chamber. Wray, thou art worthy to stand upon the Pillory, are not Actionable, for it is but an implication, but in the words in the Case at the Bar there is a vehement intendment, that his oath was in the quality of a Defendant, or Deponent; which Gawdy granted, in the Case 28. Eliz. Thou wast forsworne in Whitchurch

Church Court, there the words are not actionable; for that Court is not known to you as Judges. And it may be it is but a great House or Manſion house called Whit-church Court: But here in the principal caſe it cannot be meant but a Court of Juſtice, and before the Judges there juridice, and the ſubſequent words ſound ſo much, I will make thee ſtand upon a Stage for it. And afterwards Judgement was given for the Plaintiff.

Trin 30. *Eliz.* In the Kings Bench.

CLXXIV. Gatefould *and* Penns *Caſe.*

Preſcription for tythes.

GAtefould Parſon of North linne libelled againſt Penne in the ſpirituall Court for tythes in Kind of certain paſtures: The Defendant to have prohibition doth ſurmiſe, that he is Inhabitant of South-linne, and that time out of mind, &c. every Inhabitant of South-linne having paſtures in North linne hath paid tythes in Kind for them unto the Vicars of South-linne, where he is not reſident, and the Vicar hath alſo time out of mind payed to the Parſon of North-linne for the time being two pence for every acre. Lewis, this ſurmiſe is not ſufficient to have a prohibition, for upon that matter Modus Decimandi ſhall never come in queſtion, but only the right of tythes, if they belong to the Parſon of North-linne, or to the Vicar of South-linne, and he might have pleaded this matter in the ſpiritual Court, becauſe it toucheth the right of tythes, as it was certified in the Caſe of Baſhly by the Doctors of the Civil Law. Gawdy, this preſcription doth ſtand with reaſon, for ſuch benefit hath the Parſon of North-linne, if any Inhabitant there hath any Paſtures in South-linne. And afterwards the whole Court was againſt the prohibition, for Modus Decimandi ſhall never come in debate upon this matter, but who ſhall have the tythes, the Vicar of South-linne, or the Parſon of North-linne? and alſo the preſcription is not reaſonable.

Trin. 30. *Eliz.* In the Kings Bench.

CLXXV. Gomerſall *and* Biſhopps *Caſe. Hill.* 31. *Eliz, Rot* 175.

BIſhop libelled in the Spiritual Court for tyth Hay, the Plaintiff Gomerſall made a ſurmiſe, that there was an agreement betwixt the ſaid parties, and for the yearly ſum of ſeven ſhillings to be paid by Gomerſall unto Biſhop, Biſhop faithfully promiſed to Gomerſall, that Gomerſall ſhould have the tythes of the ſaid Land during his life. And upon an Attachment upon a Prohibition Gomerſall declared, that for the ſaid annual ſum Biſhop leaſed to the Plaintiff the ſaid tythes for his life: And upon the Declaration Biſhop did demurre in Law for the variance between the Surmiſe and the Declaration, for in the Surmiſe a promiſe is ſuppoſed, for which Gomerſall might have an Action upon the Caſe; and in the Declaration a Leaſe. But note, that the Surmiſe was not entred in the Roll, but was recorded by it ſelf, and the Declaration only enrolled. Godfrey, it was reſolved in the Caſe betwixt Pendleton and Hunt, that an Agreement betwixt the Parſon and any of his Pariſhioners is a good cauſe to grant a Prohibition, if he libel in the Spiritual Court againſt ſuch Agreement, becauſe the Spiritual Court cannot try it, and they will not allow ſuch a Plea. Curia, the Surmiſe is as a Writ, for which if variance be betwixt the ſame and the Declaration all is naught.

Prohibition for tythes.

Trin.

Trin. 30. *Eliz.* in the Kings Bench.

CLXXVI. Colbourne *and* Mixstones *Case.* *Intrat. Hill.* 31. *Eliz. Rot.* 146.

COlbourne was sued in the Spiritual Court, for that being Executor to one Alice Leigh, he had not brought in a true Inventory of all the goods of the said Allice, but had omitted and left out a lease of two houses, and this sute was at the pursuit of two Daughters of the Testator. Colbourn sueth for a Prohibition; and surmises and declares, how this Lease is extinct, and the matter was this, H Leigh was seised of a house called the Marygold, and two other houses in London, and leased the said two houses to one Alice Cheape for one and twenty yeares, if she should live so long, and afterwards made a Lease in Reversion of the said two houses to the said Allice Leigh for one and twenty yeares, and afterwards he devised these two houses, and also the house called the Marigold to the said Allice Leigh for her life for to bring up his children, and dyed, after whose death the said Allice Leigh entred into the said house called the Marigold, and took the rents and profits of the said two houses for the space of seven yeares, virtute testament. prædict. upon which Declaration the Defendants do demurre in Law. Cook, the Declaration is not good, and for the matter of it, it is clear, that by this devise unto Alice, her Term in future is not extinct without her agreement to it: And also in this Case the Devise is not for the benefit of the said Allice Leigh, but of her children, and she hath a liberty to accept or refuse the said estate by devise, and to make her election: And the Plaintiff hath declared, that she hath accepted the Rent reserved upon the Lease of the said two houses for seven yeares: And therein the Declaration naught in divers respects. 1. He hath declared, that the said Ailice Leigh hath accepted the Rents of the said two Houses, by reason of the reversion, & virtute Testament. prædict. by seven yeares, which is double and treble, for acceptance of a Rent at one day, scil. one rent day is a sufficient election: As if the Issue in tail, after the death of his Ancestor, who hath made a Lease not warranted by the Statute, once accepts the Rent, the Lease is affirmed; but if in plea pleading, the acceptance of the said Rent for three yeares be pleaded, the same clearly is not good; for no good Issue can be taken thereupon: 2. This acceptance is not pleaded (as the Law wills) and in the phrase of the Law, viz. to which devise she agreed, but pleads the acceptance of the Rent, which is matter of evidence, the which is not good pleading. As 5 H 7. 1. One sweareth another to enter into his Land, and the same to occupy for a certain time, the same is a Lease in Law; and if in pleading the party is to make his title to the same Land, he ought plead it as an expresse Lease, and not as a Licence; and if the Lease be traversed, he may give the Licence in evidence. Tanfeild presently by the devise, The estate for life is in the Devisee and the Term extinct by it, and that is sufficient for the Plaintiff: And if there was any disagreement the same is to be shewed on the other side. But if Allice had not notice of the Devise, but dyeth before notice, the same amounteth unto a disagreement. And as to the pleading of the Agreement, I conceive it is well enough pleaded, for if the Lease had not been she might have entred, & then if such Entry had been pleaded it had been good enough, and then because she could not enter by reason of the said Lease, she hath taken the rents and profits which is an actual agreement, and as wrong as an Entry. Also we have shewed that she had entred into the house called the Marigold, of which the Devisor dyed seised in possession, and that is a sufficient agreement for the whole, for it is an entire Legacy. As 18 E 3. Variance 63. If the Reversion of three acres be granted, and the Tenant for life attorneth for one acre.

Devises.

Extinguishment.

Estate executed.

Assent not to be apportioned.

cre, it is a good attornment for the whole, for he cannot apportion his aſſent: and 2 E 4. 13. If the Executor deliver unto the Deviſee goods to him deviſed to redeliver them to him again at ſuch a day, the ſame is a good aſſent, and execution of the Deviſe, and the words of the re-delivery are void. Gawdy, The deviſe doth not veſt the eſtate in the Wife until agreement, where a man takes in a ſecond degree, as in a Remainder the ſame veſts preſently before agreement, but where he taketh immediately it is otherwiſe, and he held the agreement was well enough pleaded. Wray, preſently upon the death of the Teſtator, the Free-hold reſted in the Deviſee, and if it was not an Agreement, ut ſupra, by taking of the Rents, yet the entry into the Marygold was a conſent, and an Execution of the whole Legacy; and as to the reſt he agreed with Gawdy. Clench, the Free-hold reſted preſently in Alice Leigh before agreed, alſo the entry into the Marigold is an execution of the whole Legacy to the Deviſee, for her entry ſhall be adjudged moſt beneficial for her; and that is, for all the three houſes.

Trin. 30. *Eliz.* in the Kings Bench.

CLXXVII. Stranſham *and* Medcalfs *Caſe*

STranſham libelled in the Court of the Biſhop of Norwich againſt Medcalf, for a portion of Tythes, as Farmor of the Rectory of Dunham: The Parſon of Stonham came in and ſaid, that the Land, whereof the Tythes are demanded, is in his Pariſh of Stonham, and not in the Pariſh of Dunham; and afterwards ſentence paſſed againſt Stranſham; who brought an Appeal, and notwithſtanding that, by the Statute of 32 H 8. cap. 7. the ſpiritual Judges may proceed to make proceſſe againſt the Appellant for coſts, for the principal matter, ſcil. parcel, or within ſuch a Pariſh or not is tryable at the Common Law. Cook now prayed a Conſultation; and he confeſſed (ut ſupra) that the matter was tryable at the Common Law; but yet the coſts were not given for the matter, but for the unjuſt veration, and it was his ſute and own act to proſecute the ſame in the Spiritual Court. Note, that Stranſham had a Prohibition to ſtay the proceedings for the coſts, for in ſome caſes the Plaintiff himſelf, who libelleth, may have a Prohibition, and that was the caſe betwixt Wignal and Brook. And afterwards a Conſultation was granted by the Court; for Stranſham had begun the Sute in the Spiritual Court in the principal matter, and therefore he cannot have a Prohibition for the coſts. But afterwards Judgement was ſtayed, for the ſaid Statute ſpeaks ſpecially in caſe of Tythes, where the Court hath Juriſdiction, and here it hath not of the matter: But it was ſaid, that if a Conſultation be once granted, the party ſhall never have another Prohibition in the ſame cauſe, as it was holden in the caſe betwixt Hoskins and Jones.

No Prohibition for coſts in the ſpiritual Court.

Paſch. 31. *Eliz. Rot.* 186. In the Kings Bench.

CLXXVIII. Chamberlain *and* Thorps *Caſe*.

IN Debt upon a Recognizance acknowledged in London, the Plaintiff declared, that London is antiqua Civitas, and that they have uſed time out of mind, &c. That the Mayor take Recognizances of any perſon being of full age, and not a Feme Covert, every day in the year, except Sundayes, Holydayes, Councel dayes, and dayes of Quarter Seſſions and Goale-delivery; And declared further, how that the Defendant ſuch a day did acknowledge a Recognizance to him, &c. Fanſeild, the Declaration is not good, but the cuſtom

Recognizances in *London*, by cuſtom.

ſtome, as it is laid, is unreaſonable, for thereby, the Mayor might take Recognizances of Idiots, men of Non ſanæ Memoriæ, &c. nor is it reſtrained to any perſons, or to any matters, but is too general, and therefore cannot be a good cuſtome: Gawdy, the Declaration is good notwithſtanding the Exception for want of averment, for that ought to come in on the other ſide. And as to the cuſtome I conceive it is not good, for it is hard That they ſhould take Recognizances of all Perſons, and for all Cauſes which riſe out of the City, and through the whole Realm, as well as within the City: alſo none ſhall take a Recognizance, but a Judge of Record, and a Recognizance cannot be taken by preſcription. As to the firſt Exception, Wray agreed with Gawdy, and as to the Cuſtome, he held the ſame to be good. For it hath been alwaies allowed, and their cuſtomes are confirmed by Act of Parliament which makes them good. But if the cuſtome be not confirmed by Parliament it is not good; alſo it is not an unreaſonable Cuſtome, for it is for the benefit of the Subjects to have ſecurity for their debts. Cook, The Recognizance makes the Debt locall, and therefore 13 Rich. 2. bar 649. Debt was brought in London upon a Recognizance acknowledged in the Chancery at Weſtminſter, and the Writ was abated; for the Recognizance makes it locall there; and by him the cuſtome ſtands with reaſon, The Mayor is ſuch a perſon who may take a Recognizance, for he is a Judge of Record. See 1 H. 7. 20. and Br. Recognizance 8. and the Recogniſee cannot have an Action of Debt upon this Recognizance elſewhere then in London. For it is not a debt out of the Juriſdiction of the Court, for the Recognizance hath made it local. Wray, If the Recognizor be within age, the ſame ſhall come in of the other ſide, and the Plaintiff needs not ſhew the ſame in his Declaration, Cook, It was agreed betwixt Mabbe and Frend, That ſuch a Recognizance was good. Tanfield, the ſaid Recognizance was taken for Orphans goods which is a thing within their Juriſdiction. Clench, They of London cannot take Recognizance of more then they can hold plea of it. Wray, they have uſed of long time to take Recognizances, and their cuſtomes are confirmed by Parliament, and a more ſtrange cuſtome then this hath been allowed of here before, ſci. That a feme Covert ſhall ſue an action alone without her Huſband, for ſhe is a ſole Merchant; Alſo they do certifie Recognizances ore tenus. Gawdy, a Feme Covert may have an action within the City, but not here.

Hil. 32. *Eliz. Rot.* 434 In the Kings Bench.

CLXXIX. Pierce *againſt* Howe

Action upon the caſe for words.

AN Action upon the Caſe for theſe words, Pierce hath taken a falſe Oath in the Conſiſtory Court of the Biſhop of Exeter, and upon the Declaration, the Defendant did demur in Law. And by Prideaux theſe words are actionable, although the perjury be ſuppoſed to be committed in the ſpiritual Court; For he ſhall be excommunicated if he will not appear, and he ſhall do pennance in a White ſheet, which is as great a diſgrace as to be ſet upon the Pillory. And it was ruled in an action upon the caſe betwixt Dorrington and Dorrington, upon thoſe words, Thou art a Baſtard, that an action lyeth, and yet Baſtardy is a ſpiritual matter, and there determinable; So for theſe words Thou art a Pirat, an action lyeth, and yet Piracy is not puniſhable by the common Law, but in the Court of Admiralty. And theſe words, He hath taken a falſe oath, do amount to theſe words, He is forſworn. Wray conceived, that the words are not actionable, for there is a proviſo in the Statute of Eliz. cap. 9. That the ſaid Act ſhall not extend to any Eccleſiaſtical Court, but that every ſuch offendor ſhall be and may be puniſhed by ſuch uſual and ordinary Lawes as heretofore hath been, and is yet uſed, and

frequent in the said Ecclesiastical Court; Gawdy upon these words, an action doth not ly, for they are not pregnant of any perjury in the Pl. for he may be meer passive in it: for if one of the Masters of the Chancery minister an Oath unto any person, or any Commissioners, &c. and the Plaintiff sweareth falsely, a man may say, That the Master of the Chancery, or the Commissioner hath taken a false oath: and yet he is not guilty of falsity. And afterwards Wray, mutata opinione, That the Proviso in the said Statute, is to this intent, That notwithstanding the said Statute, such an offence may be enquirable and examined in the Ecclesiastical Court in such manner as it was before, but the same doth not take away or restrain the authority of the Common Law, but that such an offence may be here examined. And it hath been lately adjudged in the Star-Chamber, That such perjury was examinable there, for it is not restrained: and as to the latter exception, upon these words (he hath taken a false oath) it shall be intended actively, and not passively, and if so, the defendant ought to have so pleaded it, and afterwards judgement was given for the Plaintiff.

Trin. 30. *Eliz.* In the Kings Bench.

CLXXX. Palmer *and* Smalbrookes *Case.*

IN an action upon the Case by Palmer against Smalbrook, The Plaintiff declared, That the Defendant had recovered a certain debt against A. and thereupon purchased a Writ of Capias against A to take his body and delivered the said Capias to the Plaintiff being then Sheriff, and prayed a Warrant for the serving of the said Capias; and that he would name in it, one B for special Bayliff, and promised the Plaintiff that if B arrested A by force of the said Capias, and suffered him to escape, That he would not sue the Plaintiff for the escape: and shewed further, That he made a Warrant according to the said Capias, and therein named and appointed the said B. his speciall Bailiff, who arrested A accordingly and afterwards suffered him to escape, and the Defendant notwithstanding his promise aforesaid, sued the Plaintiff, for the said escape. And it was found for the Plaintiff; It was moved in arrest of Judgement, That the promise is against the Law, to prevent the punishment inflicted by the Statute of 23 H. 6. upon the Sheriff, and it is meerly within the Statute, and so the promise void. Cook, The same is not any Bond or promise taken of the Prisoner, nor of any for him, and therefore it is not within the Statute, and it was Danvers Case. Wray, A promise is within the Statute as well as a Bond but the Statute doth not extend but where the Bond or promise is made by the prisoner, or by any for him; And after Judgement was given for the Plaintiff.

Hill. 30. *Eliz.* In the Common Pleas.

CLXXXI. Mounson *and* Wests *Case.*

IN Trespass by Mounson against West, the Jury was charged and evidence given, and the Jurours being retired into a house for to consider of their evidence. they remained there a long time without concluding any thing; and the officers of the Court who attended them seeing their delay, Searched the Jurours if they had any thing about them to eat; upon which search it was found, that some of them had figs, and others pippins; for which the nert day the matter was moved to the Court, and the Jurours were examined upon it upon Oath. And two of them did confesse that they had eaten figs before they

they had agreed of their verdict: and three other of them confeſſed, That they had Pippins, but did not eat of them, and that they did it without the knowledge or Will of any of the Parties. And afterwards the Court ſet a fine of five pound upon each of them which had eaten, and upon the others who had not eaten fourty ſhillings. And they would adviſe, if the verdict was good or not, for the Jury found for the Plaintiff. And afterwards at another day, the matter was moved, and Anderſon was of opinion, That notwithſtanding the ſaid Miſdemeanour of the Jury, the verdict was good enough, for theſe victuals were not given to them by any of the Parties to the action, nor by their means, or procurement. Rhodes thought the contrary, becauſe ſome of the Jurours had eaten, and ſome not, contrary if all of them had eaten. See 14 Hen. 7. 1. A Jury was charged and before their verdict, they did eat and drink, and it was holden that upon that miſdemeanour, their verdict was void, for which cauſe a venire facias de novo was awarded. And it was prayed by the Counſel of the Defendant Weſt, That the ſaid miſdemeanour ſo found by examination might be entred of Record, which the Court granted. And afterwards at another day, the matter was moved again. And upon great adviſe and deliberation, and conference with the other Judges, The verdict was holden to be good notwithſtanding the miſdemeanour aforeſaid. See 24 E. 3. 24. 15 Hen. 7. 1. 2. Hen. 7. 3. 29 Hen. 8. 37. and 35 Hen. 8. 55. where it was holden, where the eating and drinking of the Jury at their own coſts is but fineable, but if it be at the coſts of any of the parties, the verdict is void. And ſee Book Entries 251. The Jurours after they went from the Bar ad ſeipſos of their verdict to be adviſed, comederunt quaſdam ſpecies, ſci. raiſins, dates, &c. at their own coſts, as well before, as after they were agreed of their verdict; And the Jurours were committed to priſon; but their verdict was good, although the verdict was given againſt the King.

Where Jurors ſhall be fined for eating before verdict; but it ſhall not make void the verdict.

Hill. 30. *Eliz.* In the Common Pleas.

CLXXXII. Hunt *and* Gilborns *Caſe.*

IN Dower brought by Hunt and his Wife againſt Gilborn, The Defendant pleaded, That the Land of which Dower is demanded, is of the nature of Gavelkind, and that the cuſtome is, That in Dower of Land of ſuch nature The Wife ought to be endowed of the moiety of ſuch Land, Tenendum quam diu non maritata remanſerit, & non aliter: upon which plea in bar, the Demandants did demur in Law; and the Lord Anderſon was of opinion, That the Cuſtome is ſtrongly pleaded againſt the Dower in the affirmative with a Negative & non aliter, and that is confeſſed by the Demurrer, That Dower out of ſuch Land ought to be ſo allowed, and ſo demanded, and in no other manner. And by Periam, If thoſe words (& non aliter) had not been in the Plea; yet the Demandants ſhould not have Judgement: For Dower by moiety, & non maritatis, is as proper in caſe of Gavelkind, as Dower of the third part of Land, at the Common Law, and as the deſcent in ſuch caſe of Lands to all the Sons. And afterwards Judgement was given againſt the Demandants.

Dower of *Gavelkind* by Cuſtome.

Hill.

Hill. 30. *Eliz.*

CLXXXIII. *The Case of the Provost and Schollars of Queens Colledge in* Oxford.

THe Provost, Fellowes, and Schollars of Queens Colledge in Oxford, are Guardians of the Hospital, or Meason de Dieu in Southampton. And they make a Lease of the Land parcel of the said Hospital to one Hazel for Term of years by the name Præpositus socii & Scholores Collegii reginalis in Oxonia, Gardianus Hospitalis, &c. And in an Ejectione firmæ upon that lease, It was found for the Plaintiffs, and it was objected in arrest of judgement, That the word Gardianus, ought to be Gardiani, for the Colledge doth consist of many persons, and every person is capable, and it is not like unto Abbot and Covent: But the whole Court was of opinion, that the Exception was good, but that as well the Lease as also the Declaration was good, for the Colledge is one bodie, and as one person: And so it is good enough Gardianus.

Hill. 30. *Eliz.* in the Common Pleas.

CLXXXIV. Wooden *and* Hazels *Case.*

Nisi Prius. IN an Ejectione betwixt Wooden and Hazel they were at issue upon, Not Guilty: and a Venire facias awarded returnable, Tres Trinit. And the Essoin adjudged and adjorned by the Plaintiff untill Michaelmas Terme; And at the nert Assises, the Plaintiff notwithstanding that Essoin, and the adjorning of it procured a Nisi Prius, by which it was found for the Plaintiff: And now it was moved in Court for the stay of Judgement, because no Nisi Prius ought to issue in the Case. For the Essoin was adjudged and ad-
Essoin. jorned untill Michaelmas Term by the Plaintiff himself. And Lennard custos Brevium said, That the Words of the Statute of Westminster 2. cap. 27. Postquam aliquis posuerit se in aliquem inquisitionem ad proximum diem allocet. ei essoin. imports, That the Essoin shall not be taken at the return of the Process against the Jury, although the Jury be ready at the Bar. Anderson was of opinion, That the awarding of the Nisi Prius ut supra, is but a misawarding of the Process, and then relieved by the Statute. And afterwards the case being moved at another day, the Court was clear of opinion, That no Nisi Prius ought to issue forth in this case, because that the Plaintiff himself, by the adjourning of the Essoine, cast by the Defendant untill Michaelmas Term, had barred himself of all Proceedings in the mean time: But afterwards it was surmised to the Court on the Plaintiffs part, that he the Defendant was not essoined, for the name of the Defendant is Edward Hazel, and it appeared upon the tryal that Edward Russel was essoined, but no Edward Hazel, and then if no Essoin, no adjournment, and then the Plaintiff is at large, &c. and may proceed, &c. But the Remembrance of the Clark was Edward Hazel, as it ought to be, and yet it was holden of no ef-
Amendment. fect, being in another Term: And afterwards the Counsel of the Defendant prayed, That the Roll in hac parte, be amended according to the Remembrance of the Clark: But the Court utterly denied that, for no Statute gives amendment, but in the affirmance of Judgements, and Verdicts, and not in defeazance of Judgements or Verdicts: and afterwards it was resolved by the whole Court, That Judgement be entred for the Plaintiff.

Hill.

Hil. 32. *Eliz. Entratour M* 29. *and* 30. *Eliz. Rot.* 2116.

CLXXXV. *Sir* Henry Goodiers *Case.*

IN an Ejectione firmæ the Case was, Sir Ralph Rowlet possessed of certain Lands for years, made his Will, and ordained Sir Nicholas Bacon, Keeper of the great Seal of England, Sir Robert Catline, Lord Chief Justice of England, Justice Southcole, and Gerrard Attorney General his Executors, and dyed. And afterwards the said persons named Executors, sent their Letters to the Chief Officer of the Prerogative Court as followeth. Whereas our Loving friend Sir Ralph Rowlet Knight, lately deceased, made and ordained us Executors of his last Will, and whereas our Business is so great, That we cannot attend the execution of the said Will, Therefore we have thought good to move the bearer hereof Mr. Henry Goodier one of the Coheirs of the said Sir Ralph to take upon him the execution of the said Will. And therefore we pray you to grant Letters of Administration in as ample manner as the Justice of the cause doth require; and afterwards an Entry was made in this manner in the same Court. Executores testamenti prædict. executionem inde super se assumere distulerant & adhuc distarent: And upon that the said Goodier obtained Letters of Administration, and granted a Lease to A for years, of which the said Sir Ralph Rowlet dyed possessed. And afterwards Sir Robert Catline claiming as Executor, granted the same Term to another, &c. and all the matter of difficulty was, If this Letter written by the Executors be a sufficient Renounciation of the Executorship in Law, so as the Executors cannot afterwards claim or use the said authority, &c. 2. If the Entry of the said Renounciation be sufficient and effectual. And it was argued by Ford, one of the Doctors at the Civil Law, That as well the Renounciation as the Entry of it is good and sufficient in Law, so that none of the Executors could after entermeddle. And he said, That in their law, there is not any certain form of Renounciation, but if the meaning and intention of the Renouncer appeareth, it is sufficient without any formall Termes of Renounciation: And he put many rules and Maximes in their Law to the same purpose. Ego dico me nolle esse hæredem, are sufficient words to such intent. Non vult hæres esse quin ad aliam tranferre debet hæreditatem. Qui semel repudiavit hæreditatem non potest eam repetere. Quod semel placuit, post displicere non potest; variatio non permitticur in contractibus. So that after the Executors have signified to the Officer of their Court their pleasure to renounce the Execution of the Will, they cannot afterwards entermeddle, nam interest reipublicæ ut dominia rerum sint in certo. And as to the Entry of the said Renounciation inter acta Curiæ, distulerant et adhuc distarent, that was the error of the Clark. And it is a Rule in our Lawe, veritas rerum gestarum non vitiantur Errore factorum. And the Lord Anderson demanded of the said Doctor, how far those words hæres, et hæreditas did extend in their Law, who answered, That hæreditas comprehends all Chattells, as well real as personal, Inheritance as Chattels, for by their Law, Hæreditas nihil aliud est quam successio in universum jus quod defunctus habuit tempore mortis suæ. And afterwards the Court gave day to the other party to hear an Argument of their side, but the case was so clear, That no Professor of the Civil Law would be retained to argue to the contrary. And afterwards Judgement was given, That the said Renounciation, and the entrie of it was sufficient.

Renouncing of an Executor-ship.

Mich.

Mich. 30 *Eliz.* in the Common Pleas.

CLXXXVI. Littleton *and* Pernes *Case.*

Debt.

Littleton brought Debt upon an Obligation against Humphry Pernes, who pleaded, that the said Obligation was endored with this condition, for the performance of certain Articles and Covenants contained in certain Indentures, by which Indentures the Plaintiff first covenanted, that Edward brother of Humphry should enjoy such Land until the first of Michaelmas next following, rendring such Rent at the end of the said Terme: and the said Humphry covenanted, that the said Edward at the Feast aforesaid should surrender quietly and peaceably the said Lands to the Plaintiff, and that the said Plaintiff to such of the said Lands as by the custom of the Country, tunc jacebant frisca, should have in the mean time free ingresse, egresse, &c. at his will and pleasure, with his servants, ploughs, &c. And as to that Covenant, the Defendant pleaded, Quod permisit querentem habere introrationem & exitum, &c. in tales terras, quales tunc jacebant secundum consuetudimem patriæ, &c. And Exception was taken to this plea, because he hath not shewed in certain, which Lands they were which then did lie Frecy, according to the custome of the Country; which Anderson allowed of, but Walmesley strongly insisted to the contrary: And he confessed, that where an Act is to be done, according to a Covenant, he who pleads the performance of it ought to plead it specially; but as our case is, here is no Act to be done, but a permittance as abovesaid, and it is as in the Negative, a not disturbance, in which case permisit is a good plea; and then it shall come on the other side on the Plaintiffs part, to shew in what Lands the Defendant non permisit: Which difference see agreed, 17 E 4. 2. 6. by the whole Court. And such was the opinion of the whole Court in the principal case.

Another Exception was taken to it, that the Defendant had covenanted, that his brother Edward should pay to the Plaintiff the said Rent; To which the Defendant pleaded, that his said brother had payed to the Plaintiff before the said Feast of Michaelmas, in full satisfaction of the said Rent, three shillings, and that was holden a good plea; and upon the matter the Covenant well performed, for there is not any Rent in this Case, for here is not any Lease, and therefore not any Rent. For if A covenant with B, that C shall have his Land for so many yeares rendring such a Rent, here is not any Lease, and therefore neither Rent. But if A had covenanted with C himself, it had been otherwise, because it is betwixt the same parties. And if the Lessee covenant to pay his Rent to the Lessor, and he payeth it before the day, the same is not any performance of the Covenant, causa patet, contrary of a sum in grosse: Another Covenant was, that the said Humphry solveret ex parte dicti. Edwardi 20 l. to which the Defendant pleaded, that he had paid ex parte dicti. Humfridi 20 l. and that defect was holden incureable, and therefore the Plaintiff had Judgement to recover.

Mich. 30. *Eliz.* in the Common Pleas.

CLXXXVII. Geslin *and* Warburtons *Case.*

In an Ejectione firmæ by Joan Geslin against Hen. Warburton and Sebastian Crispe of Lands in Dickilborough in the County of Norfolk, Mich. 30. and 31 Eliz. rot. 333. upon the general Issue, the Jury found a special verdict, that before the Trespasse supposed one Martin Frenze was seised of the Lands,

Lands, of which the Action was brought in tail to him and the Heires males of his body, and ſo ſeiſed ſuffered a common Recovery to his own uſe, and afterwards deviſed the ſame in this manner: I give my ſaid Land to Margaret my Wife, until ſuch time as Prudence my Daughter ſhall accompliſh the age of nineteen yeares, the Reverſion to the ſaid Prudence my Daughter, and to the Heires of her body lawfully begotten, upon condition that ſhe the ſaid Prudence ſhall pay unto my ſaid Wife yearly during her life, in recompence of her Dower of and in all my Lands twelve pounds, and if default of payment be made, then I will that my ſaid Wife ſhall enter and have all my Lands during her life, &c. the Remainder, ut ſupra, the Remainder to John Frenze in tail, &c. Martin Frenze dyed; Margaret entred, the ſaid Prudence being within the age of fourteen yeares; Margaret took to Husband one of the Defendants, John Frenze being Heir male to the former tail brought a Writ of Error upon the ſaid Recovery and aſſigned Error, becauſe the Writ of Entry upon which the Recovery was had, was Precipe quod reddat unum Meſſuag. and twenty acras prati in Dickleborough, Lynford, Hamblets, without naming any Town: And thereupon the Judgement was reverſed. And it was further found, that in the ſaid Writ of Error, and the proceſſe upon it, no Writ of Scire facias iſſued to warne dictam Prudentiam ten. exiſtentem liberi ten. præmiſſorum, ad oſtendendam quid haberet, vel dicere ſciret quare Judicium prædict non reverſaretur: The Jury further found, that the ſaid Margaret, depending the ſaid Writ of Error, was poſſeſſed virtute Teſtamenti & ultimæ voluntatis dict. Martini, reverſione inde expectant. dictæ Prudentiæ pro ut lex poſtulat: And they further found, that ſix pound of the ſaid twelve pounds were unpaid to the ſaid Margaret at the Feaſt, &c. and they found, that the ſaid John Frenze, prætextu Judicii ſic reverſat. entred into the premiſſes as Heir male, ut ſupra. And ſo ſeiſed, a Fine was levyed betwixt John Frenze Plantiff, and one Edward Tyndal, and the ſaid Prudence his Wife Deforeants, and that was to the uſe of the ſaid John Frenze: And that afterwards Humphry Warberton and the ſaid Margaret his Wife, brought a Writ of Dower againſt the ſaid John Frenze, Edw. Tyndal, and Prudence his Wife, of the ſaid Lands: The ſaid Edward and Prudence made default, and the Demandants counted againſt the ſaid Frenze, and demanded againſt him the moyety of the third part of the ſaid Lands: To which the ſaid Frenze pleaded, that the default of the ſaid Edward and Prudence, idem Joh. Frenze nomine non debet, quia he ſaid, that he the ſaid John was ſole ſeiſed of the Lands aforeſaid at the time of the Writ brought, &c. and pleaded in Barre, and it was found againſt the ſaid John, and Judgement given for the Demandants of the third part of the whole Land, and ſeiſin accordingly: And that afterwards, 17. Eliz. the ſaid Frenze levyed the Fine to the ſaid Tyndal, to the uſe of the ſaid Tyndal and his Heires: And they found, that after the ſaid Feaſt the ſaid Henry Warberton and Margaret his Wife came to the Meſſuage aforeſaid half an hour before ſun-ſet of the ſaid day, and there did demand the debt of the ſaid twelve pounds, to the ſaid Margaret, by the ſaid Martin Frenze deviſed, to be paid unto them, and there remained till after ſun-ſet of the ſaid day, demanding the Rent aforeſaid, and that neither the ſaid Tyndal nor any other was there ready to pay the ſame.

Deviſes. Error. Dower.

And firſt it was moved, if the ſaid yearly ſum of twelve pounds appointed to be paid to the ſaid Margaret were a Rent, or but a ſum in groſſe: And the opinion of the Court was, that it was a Rent, and ſo it might be fitly collected out of the whole Will, where it is ſaid, that Prudence his Daughter ſhould have the Land, and that ſhe ſhould pay yearly to Margaret twelve pounds in recompence of her Dower, &c. But if it be not a Rent, but a ſum in groſſe, it is not much material to the end of the caſe: For put caſe it be a Rent, the ſame not being pleaded in barre, the Dower is well recovered, and then when default of payment is made, if the Wife of the Deviſor ſhall have the whole,

was the Question: And the Court was clear of opinion, that by the sute and Judgement in the Writ of Dower, the Wife of the Devisor had lost all the benefit which was to come to her by the devise: For the said Rent was devised to her in recompence of her Dower, so as it was not the meaning of the Devisor that his Wife should have both. And therefore by the Recovery in Dower she had dismissed her self of the Rent, and by consequence of the benefit of the penalty for not payment of it.

Hill. 30. *Eliz.* in the common Pleas.

CLXXXVIII. Stephens *Case.*

IN an Ejectione firmæ the case was, that the Father covenanted with one A, that in consideration of a Marriage to be had betwixt the Son of the Covenantor and the Daughter of A, that he before such a day would levy a Fine, which Fine should be to the uses of the said Son and Daughter in tail for the Joynture of the Daughter. The Fine is levyed accordingly to the uses aforesaid: The Father dyeth, but in the Fine no mention is made of any marriage had: And upon that matter the Court was clear of opinion, that notwithstanding that the marriage was not accomplished, yet the estate tail was well enough executed in the Son and Daughter, for the Fine without any consideration doth carry the uses, but without a Fine such a consideration would not raise such an use without accomplishment of the marriage, for the consideration executed ought to produce the use. But in this case the uses are perfected by the Fine, and A upon the matter might have had covenant against the Father to have the Fine before the marriage.

Fines levied raise an use.

Mich. 30. *Eliz.* in the Common Pleas.

CLXXXIX. Billford *and* Foxes *Case.*

BIllford brought an Action of Debt against Fox and his Wife, Executrix of one A her former Husband, processe continued against them, till the Exigent, upon which the Husband appeared, and put in a Supersedeas for himself only, without making mention of his Wife, and the case being moved to the Justices, they demanded of the Prejgnothories what was to be done, for the same is practise and a dangerous case for example. And it was answered by the Prejgnothories, that the Court cannot remedy it, for now by the Supersedeas the Husband is sine die, for he shall not be driven to answer without his Wife, as this case is, and he is impleaded, as in the right of his Wife, and therefore the Wife shall be waived, and the Husband discharged. See the Book of Entries 187. Debt against the Husband and Wife, and processe continued until the Exigent, the Husband rendered himself, and the Wife was waive, and Judgement given, quia videbitur Justiciariis hic that the Husband absque prefata uxore sua respondere non potuit, & rationi dissonum sit, ipsum in Curia hic, cum in eadem loquela respondere non potuit, ulterius detineri, ideo eat inde sine die. And so see 43 E 3. 18. Detinue against the Husband and Wife, the Wife is waive, and the Husband rendered himself at the Exigent. And the poynt of the Action was upon a baylment to the Wife, dum sola fuit, and the Husband was sine die, for he could not answer in such case without the Wife. But at the last the Justices advised thereof, and gave order that the Supersedeas should be stayed, without recording the appearance of the Husband. And by Anthrobus one of the Attorneys of the Court, that was the case of the Lady Malory and her Husband, who were sued in an Action

Debt.

Supersedeas by the Husband is not good for the Wife.

Action of Debt, and processe continued against them till the Exigent, upon which the Husband appeared and put in a Supersedeas for himself, without speaking of his Wife; and his Supersedeas was not allowed, but processe continued until Out-lawry.

Hill. 30. *Eliz.* in the Common Pleas.

CXC. *The Queen against the Bishop of* Canterbury *and others.*

THe Queen brought a Quare Impedit against the Archbishop of Canterbury, the Bishop of Chichester, and the Incumbent: And counted, that Ashburnham was seised of the Advowson, and that he was out-lawed in an Action personal at the suite of such a one, and shewed the whole Out-lawry certain. And Exception was taken to the Count, because in the setting down of the Out-lawry, the processe is alledged to be returned by the Sheriff, but the name of the Sheriff is not there expressed. As to that, it was agreed by the Court that the truth is, that it is provided by the Statute of 12 E 2. cap. 5. That the Sheriffs in their returns put their names to the said Returnes; but it is not requisite so to plead it, for the omitting thereof doth not make the Return void, but the Sheriff shall be amerced. Quare Impedit.

Another matter was objected, for that whereas the Patron had pleaded one plea, and the Incumbent the same plea by himself in barre. The Queen demurred in Law in this manner, quoad separalia placita per dictos, &c. seperaliter placitat. &c. Dicta Domina Regina necesse non habet, nec per legem terræ tenetur, respondere: And the Court was clear of opinion, that the Demurrer ought to have been several, upon the plea of the Patron by it self, and upon the plea of the Incumbent by it self.

Hill. 30 *Eliz.* in the Common Pleas.

CXCI. Mallet *and* Ferrers *Case.*

IN Tresspasse of Battery; the parties were at Issue upon, Not guilty, and at the Nisi prius it appeared, that the thumb of the right hand of the Plaintiff was clean cut off, and so maimed; And it was found for the Plaintiff, and damages tared to forty pounds, and now the party came in person into Court, and prayed, in respect of the heynousnesse of the Mayhme, that the Court would encrease the damages; which damages, upon great consideration had, were made one hundred pounds, and Judgement given accordingly. See that the cutting of any of the Fingers is a Mayhme, 28 E 3. 54. by Stone; and as for the damages further assessed by the Court, then the damages tared by the Jury, See Book Entries, 46. 8 H 4. 135. 39 E 3. 20. Damages increased of a Mayhme by the Court.

Hill. 30. *Eliz.* In the Common Pleas.

CXCII. Atkins *and* Hales *Case.*

RIchard Atkins of Lincolnes-Inne brought a Writ of Forger of false Faits against Hale of Glouceſter, and counted upon the forger of an Indenture, in quo continetur quod quidam Abbas Monasterii de Glouceſter Demisit scitum Manerii de R, & terras dominicales, &c. The Defendant pleaded, Not guilty. And it was given in evidence on the Plaintiffs part, a Lease supposed to be made and forged, containing that the said Abbot leased the said Scite, Forger of false faits.

and all the demeſne Lands of the ſaid Mannor, exceptis duobus ſeperatibus clauſuris inde,&c. vocat.&c. And it was moved, if this Evidence doth maintain the Iſſue. And it was holden by the whole Court, that the Evidence was good enough, for it is not neceſſary to conſtrue terras Dominicales, omnes terras Dominicales, for the Lands not excepted are terræ Dominicales, and ſo the Count is ſatisfied by that Evidence, &c.

Hill. 30. *Eliz.* In the Common Pleas.

CXCIII. Chamberlaine *and* Stauntons *Caſe.*

Deeds, and ſealing of them.

CHamberlaine brought Debt upon an Obligation againſt Staunton, and upon non eſt factum, the Jury found this ſpecial matter, that the Defendant ſubſcribed and ſealed the ſaid Obligation,and caſt it upon a certain table, and the Plaintiff took it without any other delivery, or any other thing amounting to a delivery. And the Court was clear of opinion,that upon that matter the Jury had found againſt the Plaintiff, and it is not like the caſe which was here lately adjudged, that the Obligor ſubſcribed and ſealed the Obligation, and caſt it upon a table, ſaying theſe words, this will ſerve, the ſame was holden to be a good delivery, for here is a circumſtance, the ſpeaking of theſe words, by which the Will of the Obligor appeareth, that it ſhall be his deed.

Hill. 30. *Eliz.* In the common Pleas.

CXCIV. Oldfeild *and* Willmers *Caſe.*

Arbitrament.

IN Debt upon an Obligation, the Defendant pleaded, that the Obligation was endorſed with condition, that the Defendant ſhould ſtand to the Award of I S, &c. who awarded, that the Defendant ſhould pay to the Plaintiff at ſuch a day 100 li. or ſhould find two ſufficient ſureties to be bound with him to the Plaintiff to pay the ſaid 100 li. to the Plaintiff, by twenty pounds a year, until the whole ſum be paid:and pleaded further,that he had performed the ſaid Award. The Plaintiff by Replication ſaith, that the Defendant hath not paid unto him the ſaid one hundred pounds,and ſo in that aſſigned the breach of the Award,and upon the Replication the Defendant doth demurre in Law,becauſe by the pretence of the Award, the Defendant had election either to pay the one hundred pounds at the day, or to find two ſureties for the payment of it by twenty pounds per annum, &c. for ſo is the Award in the disjunctive. But the Court was clear of opinion, that the Replication was good, for although that the Award be ſet down and conceived in words disjunctive, yet in Law and in ſubſtance it is ſingle, for as to the finding of Sureties the Award is void,and ſo nothing is awarded but the payment of the one hundred pounds at the day to which the Plaintiff in his Replication hath fully anſwered: And Judgement was given for the Plaintiff.

Hill. 30. *Eliz.* In the common Pleas.

CXCV. *The Lord* Dudley *and* Lacyes *Caſe.*

Audita querela.

THe Lord Dudley brought an Audita querela againſt Lacy, and upon it a Scire facias againſt the ſame party; And at the day it was moved by the Counſel of Lacy,that in as much as no execution was ſued againſt the perſon of the Lord upon the Statute Staple, in which the ſaid Lord was bounden to the

the said Lacy, so as he was not in prison, a Scire facias ought not to issue, but a Venire facias. And the Court was clear of opinion, That it is at the election of the party greived which of them he will sue, scil. a Scire facias, or a Venire facias. See 15 E 4. 5. by Choke, Scire facias and Venire facias are all one in effect: Another matter was moved of the part of Lacy; That this Audita Querela ought to be sued in the Chancery and not in the Common Pleas. But the Court was clear of opinion, that the party might sue in which of the Courts he would. See 16 Eliz. Dyer 332. An Audita Querela upon a Statute Merchant directed to the Justices of the Common Pleas; but upon a Statute Staple, the Sute shall be in the Chancery by Andita Querela directed to the Chancellor, or by Scire facias directed to the Sheriff, quod sit in Cancellaria, &c.

Hill. 30 *Eliz.* in the common Pleas.

CXCVI. Askewe *and the Earle of* Lincolnes *case.*

ASkewe was bound to the Earl of Lincoln in a Statute Staple, the Earl sued execution, by which Askewe was put in prison; and now the freinds of Askewe offered the money in Court, and cast an Audita querela for Askewe, and prayed he might be bayled, and the money remain in Court till the Audita Querela determined. But the Earl presently demanded the money to be delivered to him, but the Court denyed it, and commanded the Preignothories to keep the money, until the Audita querela were determined: And let Askewe to bayl for the costs of sute. Audita querela.

Trin. 31. *Eliz.* in the Kings Bench.

CXCVII. Ward *and* Blunts *Case.*

WArd brought an Action of Trover and Conversion against Blunt of forty loads of Corn: as unto twenty loads the Defendant pleaded not guilty, and as to the residue a special plea, upon which the Plaintiff did demurre in Law, and it was adjudged for the Plaintiff, upon which issued a Writ of Enquiry of damages, which is returned: It was moved, that the Writ of Enquiry of Damages ought not to have issued forth, for the Issue doth yet depend untryed, and the book of 34 H 6. 1. was vouched, and there the case was, that in Tresspasse against many, one of them made default after a plea pleaded. Now a Writ of Enquiry of Damages shall be awarded, but shall not issue forth until the plea of the others be tryed, and if the Issue be tryed for the Plaintiff then the Enquest who tryed the Issue shall assesse damages for the whole, and if for the Defendant against the Plaintiff, then the Writ which was awarded to issue forth. See 44 E 3. 7. Cook, it is in the discretion of the Court, to award such Writ or not, which Wray granted, but it is usual here to grant the Writ presently: Gawdy, the case in 39 H 6. is not like this case, for in this case the Tresspasse is divided, and as it were apportioned in twenty loads, and twenty loads, but in the other case not. Trover and Conversion.

Trin. 31. *Eliz. Rot.* 666.

CXCVIII. Smith *and* Bustards *Case.*

IN an Ejectione firmæ it was found by special verdict, that one S was seised of Lands, and leased the same to F for one and thirty years, yeilding and paying

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ing twenty pounds per annum at the Font-stone in the Temple Church (the land it self lying in Essex) upon the Feasts of the Annunciation of our Lady and Saint Michael, or within twelve dayes after either of the said Feasts, by even portions, upon condition, that if the said Rent or any part thereof be unpaid by the said space of twelve dayes, Proxime post aliquod festorum vel dierum solutionis inde, that then it should be lawful for the Lessor to re-enter. T assigned his interest to Bustard the Defendant, at Michaelmas the Rent is behind, and the twelfth day after the Lessor demanded the Rent at the Temple Church; and for not payment thereof re-entred: Towse, the re-entry of the Lessor was not lawful, for by the said Reservation the Rent was not due until the twelfth day after Michaelmas, for before that he cannot have an Action of Debt, or distrein for it, and these words (dierum solutionis) are greatly material, for conditions are odious in Law, and if the words thereof be doubtful, they shall be construed for the avail of him who is bound by it. As in the case of 28 H 8. 17. If I be bound to you upon condition, to pay to you before the Feast of Saint Thomas twenty pounds, if there be in one year two Feasts of Saint Thomas, the latter Feast shall be my day of payment. Wray, this Rent is not due until the last day of the twelve dayes, for neither debt or distresse lieth for it, then the day of payment mentioned in the condition ought to be the last day of the last twelve dayes, and dict. spatium shall be construed the same number of dayes, and not the same dayes. And at last it was resolved and adjudged, that the entry of the Lessor was not congeable, but he ought to expect the latter day of the twelve dayes.

Conditions expounded liberally for the party who is to perform it.

Trin. 31. *Eliz.* in the Kings Bench.

CXCIX. *Sir* George Farmer *and* Brookes *Case.*

Prescription.

IN an Action upon the Case the Plaintiff declared, that time out of mind, &c. there had been a Mannor called Tocester, and also there had been there a Town called Tocester, and that all the Messuages, Lands and Tenements within the said Town had been holden of the said Mannor, and that he is Lord of the said Mannor, and that he, and all those whose estate he hath in the said Mannor, have used to have a Bake-house, and a Baker, to bake white bread and house bread for all the Inhabitants and Passengers there, which bread hath been of a reasonable Assize and price, and sufficient for all the Inhabitants and Passengers there (but doth not say wholsom) and that time out of mind, &c. no person had had or used any Bake-house there, but by the appointment of the said Lord of the Mannor for the time being: But that now the Defendant had erected a Bake-house unto the Nusance of the Plaintiff: The Defendant shewed, that at the time he had set up his Bake-house there were three Bakers there; and shewed, how that he was Apprentice to the Trade, and that at the time, he set up the said Bake-house for the benefit of all persons, as it was lawful for him to do. Morgan, the matter only is, if this prescription made by the Plaintiff be good or not: It is to be considered, if all prescriptions at the Common Law are one, and if all prescriptions be guided by one rule and line: And I conceive, that prescription at the Common Law is but one: And there are two poynts in prescriptions, Usage and Reasonableness, but they are not guided by one line, for some prescriptions are against strangers, and then there ought to be consideration and recompence: Some prescriptions against privies as between Lord and Tenant, for there the Tenure is sufficient, & volenti non fit injuria. For the first, see 5 H 7. 9. where in Trespasse the Defendant doth justifie, that the place where, is his Free-hold, and that he had a Foldage, and that he, and all those whose estate he hath, &c. have used, that if any man depasture his

his Sheep with the Sheep of the Defendant for the day time, that it was lawfull at night to take all the Sheep and put them in his fold all the night, and in the morning to put them out; and the same was holden a good prescription, for which the Plaintiff traversed the prescription: And for the other see 11 H 7. 13, 14. 21 H 7. 40. betwixt Lord and Tenant, that every Tenant for every pound-breach should forfeit three pounds, and see the Prior of Dunstables case, 11 H 6. 19. Br. prescription 98. The Prior declared, that he and his Predecessors time out of mind, &c. had had a Market in D every week one day, and that Butchers and others, who sold victuals, should sell the same in the high street, upon stalls of the Prior to them assigned, and that the Prior should have one penny for every stall every day; and shewed, that the Defendant had sold in his house, whereby the Prior had lost the advantage and profit of his stalls there. And the same was holden a good prescription. And on the other side, the Defendant did prescribe, that he and all house-holders of D had used to sell in their houses: The same was holden a naughty prescription. See 43 E 3. 5. and see also fuit ad moliendum upon prescription without tenure, for peradventure he had not any Mill there before, and now it is an ease to the neighbours: Vide Register 105. where the Writ is, Cum querens habeat ratione Dominii sui apud R talem libertatem quod nullus in eadem villa uti debent seu consuever. Officio, sine Mysterio tinctoris sine licentia ipsius querentis, the same is good by way of prescription, but is void by way of grant: And there the Defendant is forbid to use the trade of his Dye-house within his Manor without his licence, which appeareth upon the Writ which is in the Register (which Register was made by the Judgement and advise of the grave Judges of the Law) and there is remedy given for the like case, as is the case at the Barre. And see F B 122. b. Sectam ad furnam, and although such a manner of prescription should bind a stranger, yet here our case is stronger, for the Defendant is our Tenant. And Hill. 15. Eliz. Rot. 166. an expresse Judgement was given in such case for the Plaintiff. Buckley contrary, although that here be a losse to the Plaintiff, yet there is not a wrong, as the case in 12 H 8. 3. If I have an acre of Land adjoyning to your acre, and my acre is drowned, I may make a sluce to carry away the water, and although that by so doing your acre is drowned, yet I shall not be punished for it, because it is lawful for me to make a trench in my own Land, and then if it be any Nusance to you, you may make a trench in your ground, and so carry away the water until it come to a River or ditch. See the case 11 H 4. of Schoolmasters 200. for it is damum absque injuria. And it is against the liberty of the Common-wealth, that liberty of Contracts be not free but restrained with Privileges to one only: Vide 22 H 6. 14. If one erect a Mill neer to my Mill, no Action lyeth against him, for it is for the use of the Kings Subjects, and God forbid, that Bread and the baking of it should be restreined to any special person, especially in a Market Town. And as to the case of the Prior of Dunstable, that is not to the purpose, for there he prescribed to have a Market and the correction of it; and the fault there is not in the usurping of a Market in Nusance of the Plaintiff, but cause the Defendant sold meat there secretly, so as the Plaintiff could not have the correction of it. See 22 H 6. 14. And it is not reasonable, that such profits be restreined and drawn from the publick good to the private commodity of any person. And he cited a case which was ruled in the Exchequer 9 Eliz. upon an Information exhibited there by the Burgesses of Southampton, that the King had granted to the Burgesses of Southampton, that all the sweet Wines brought within the Realm should be unladen at Southampton only: And it was agreed by the good Lord Wray, that such a grant was not good to deprive the Common-wealth of such a benefit, and to appropiate it to one, which might be profitable to many: And it was further said by the Lord Wray, that if the King will grant by his Letters Pattents, that A B shall be of councel only with the Defendant in the Chan- Grant of the King void.

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cery, and C B with the Plaintiffs in the Exchequer Chamber, the same is no good grant, &c.

Trinit. 31. *Eliz.* in the Kings Bench. *Intrat. Hill.* 31. *Rot.* 31.

C C. Park *against* Mosse *and* How.

Trover and Conversion.

IN an Action upon the Case upon Trover and Conversion. The Defendant pleaded, that one A recovered in Debt against I P Executor of E P one hundred pounds and twenty pounds in Damages: The debt of the goods of the Testator, and the damages of the goods of the Testator, si quæ fuerint, and if not, of the goods of the Executor. Upon which A procured a Fieri facias directed to the Sheriff of N who made his Warrant to the Defendants to execute the said Writ. And before Execution I P dyed intestate, and administration was committed to the Plaintiff, and the Defendants afterwards did execution of the proper goods of I P, and sold them, and deliver the money to the Sheriff, which is the same Trover and Conversion, and averred that E P had no other goods. The Plaintiff by Replication said, that the Sheriff upon the return of the said Writ of Execution, returned as to the principal debt, that the goods of the Testator were wasted; and as to the damages, that he could not execute the Writ quia tarde.

Tanfeild, I conceive that the false return of the Defendant shall not make the Defendant punishable, for they did execution, secundum exigentiam brevis, and delivered the moneys coming thereby to the Sheriff; and if they should not be excused it should be a great inconvenience, for it is necessary that the Sheriff have inferiour Officers under him. As 37 H 6. an Executor named in the Will, named one to take the goods of the Testator in such a place, who did accordingly, and afterwards the Executor doth refuse; yet the servant shall not be punished for that medling, 13 H 7. 2. 21 H 7. 23. Where it is said by Read cheif Justice, that if the Bayly delivereth the body of one who he hath taken in Execution to the Sheriff, he shall be excused, although that the Sheriff doth not return the Capias; and we have pleaded in this case, that we have delivered the money to the Sheriff, and that is confessed by the demurrer. Altham, I conceive that this Execution after the death of the party is not good. For an Administrator is another person, wherefore new processe shall issue against him, as in all cases where the person is changed: 18 E 3. If one sueth a Certificate out of a Statute, and before execution had he dyeth, his Executors shall not have execution upon that Certificate, but first they ought to have a Scire facias: And 28 H 8. Dyer 29. Transcript of a Fine is removed by the Ancestor out of the Treasury into the Chancery, and comes in by Mittimus to have execution, and the Ancestor dyeth before Execution. Now the Heir cannot proceed without a new Mittimus, for he is another person. See 36 H 8. Br. Statute Merchant 43. and in our case here, at the time of the Execution these are not the goods of the Executor, for he is not in esse, and it ought to appear whose goods they are which are taken in Execution: If Lands be recovered against the Father who dyeth, and the Heir be ousted by Execution, without a Scire facias against the Heir, he shall have an Assize. And 6 E 6. Dyer 76. is our case. A is condemned in Debt, and a Fieri facias is awarded, and before execution A dyeth intestate: The Sheriff levyed the Debt upon the goods of the Intestate in the hands of the Administrators; upon which the Administrators brought Error and reversed the Execution. Tanfeild, the Execution is erroneous, but is not void, but shall stand until it be reversed by Error. And it was holden by the whole Court, that the false return of the Sheriff should not prejudice the Defendants: At another day it was moved again, and it was holden, that the averment, that the goods put in

Execution

Execution were the goods of the Testator the day of the Writ of Executi- on sued, was a good averment without saying, The day of Execution done, for the award of the Writ of Execution shall binde all his goods against whom the Judgement was given which he had at the day of the Writ of Execution awarded. And it was also holden, That notwithstanding the death of the party against whom,&c. The Sheriff might do execution of the goods of the dead in the hands of his Executors according to the opinion of Bryan. 16 H. 7. 6. and afterwards in the principal Case Judgement was given against the Plaintiff.

Execution against an Administrator, after the death of the Intestate of the intestatee goods; good.

Execution shal relate to the date of the Writ.

Trin. 31. *Eliz.* In the Kings Bench.

CCI. Carie *and* Denis *Case.*

The Case was; Upon a Latitat, the Sheriff returned, That by vertue of the said process he had arrested the Bodie of the Defendant, and that such a day after, and before the Return of the Latitat, a Habeas Corpus came to him to bring the bodie immediately into the Chancery, which was done accordingly, and there the Prisoner was discharged by the Order of the said Court: and the same was holden a good Return, for the Sheriff is bound to obey the Kings Writs, and to execute them, and he cannot compel the partie to put in Sureties to appear here: and the truth was, That the party was brought before the Master of the Rolls, and he did discharge him. And per Curiam, the same is no offence in the Court, but it was an ill act of the Master of the Rolls. For we oftentimes have persons here upon Habeas Corpus who are also arrested by Process out of the Exchequer, or of the Common Pleas, but we will not discharge them before they have found Sureties for their appearance, &c. and so the said Courts use to do reciprocally: and we cannot punish the Sheriff, for the Habeas Corpus was first returnable before the Latitat, but the party may have an action against the Sheriff, but we will speak with the Master of the Rolls, &c. and afterwards Bail was put in: But afterwards another Exception was taken to the Return: sci. a custodia nostra exoneratus fuit, which might be intended as to the Cause in the Chancery only, and not for the Cause here, for he hath not alledged, that he hath not alledged, That he was committed to any other in custodie, and for that cause day was given to the Sheriff to amend his Return.

Retorn of the Sheriff.

Trin. 31. *Eliz.* In the Kings Bench.

CCII. Upton *and* Wells *Case.*

In an Ejectione firmæ by Upton against Wells, Judgement was given for the Plaintiff, and upon the habere facias possessionem, The Sheriff returned that in the Execution of the said Writ he took the Plaintiff with him, and came to the house recovered, and removed thereout a woman, and two children, which were all the persons which upon diligent search, he could finde in the said house, and delivered to the Plaintiff peaceable possession to his thinking, and afterwards departed, and immediately after three other persons which were secretly lodged in the said house expulsed the Plaintiff again: upon notice of which he returned again to the said house to put the Plaintiff in full possession, but the other did resist him, so as without perill of his life, and of them that were with him in company he could not do it. And upon this Return the Court awarded a new Writ of execution, for that the same was no Execution, of the first Writ, and also awarded an attachment against the parties.

Trin. 31. *Eliz.* In the Kings Bench.

CCIII. Marſh *and* Aſtreys *Caſe.*

MArſh brought an Action upon the Caſe againſt Aſtrey, and declared, That he had procured a Writ of Entry ſur diſſeiſin againſt one A. and thereupon had a ſummons for Lands in London, and delivered the ſaid Summons to Aſtrey being under Sheriff of the ſame County; virtute cujus, the ſaid Aſtrey ſummoned the ſaid A. upon the Land, but notwithſtanding that did not return the ſaid Summons; Aſtrey pleaded Not guilty. And it was tryed in London, where the action was brought for the Plaintiff, and it was moved by Cook in arreſt of Judgement, That here is a miſtryal, for this iſſue ought to be tryed in the County where the Land is, becauſe that the cauſe is local; but the Exception was not allowed, for the action is well layed in London, and ſo the tryal there alſo is good. Another Exception was moved becauſe the action ought to be againſt the Sheriff himſelf, and not againſt the Under Sheriff, for the Sheriff is the Officer to the Court, and all Returnes are in his Name, and I grant that an action for any falſity or deceit lyeth againſt the Under Sheriff, as for embeſſelling, raſing of Writs, &c. but upon Non feaſans, as the Caſe is here, the not Return of the Summons, it ought to be brought againſt the Sheriff himſelf. See 41 Ed. 3. 12. And if the under Sheriff take one in Execution, and ſuffereth him to eſcape debt lyeth againſt the Sheriff himſelf. Another Exception was taken becauſe the Declaration is that the ſaid Aſtrey Intendens & machinans ipſum querent. in actione ſua prædict. proſequend. impedire, &c. did not return the ſaid Summons but doth not ſay, tunc exiſt. Under-Sheriff. Snag, contrary, If a Bayly Errant of the Sheriff, take one in Execution, and he ſuffer him to eſcape, an action lieth againſt the Bayly himſelf. And that was agreed in the Caſe, of a Bayly of Middleſex, and Sir Richard Dyor Sheriff of Huntington, and his Under Sheriff, who ſuffered a Priſoner to eſcape, and the action was brought againſt the Under Sheriff; for it may be the Sheriff himſelf had not notice of the matter, becauſe the Writ was delivered to the Under-Sheriff, and he took a Fee for it, and therefore it is reaſon that he ſhall be puniſhed. As if a Clerk in an Office miſ-enter any thing, he himſelf ſhall be puniſhed, and not the Maſter of the Office, becauſe he takes a fee for it. But if the Return made by the Bayly be inſufficient, Then the Sheriff himſelf ſhall be amerced, but in the principal caſe it is clear, That the action lyeth againſt the Under Sheriff if the party will, and ſuch was the opinion of Gawdy and Clench: As to the other matter, becauſe it is not alledged in the Declaration, That the Defendant was under Sheriff at the time, The Declaration is good enough notwithſtanding that, for ſo are all the Preſidents, and if the Defendant were not under Sheriff the ſame ſhall come in of the other ſide. See 21 E. 4. 23. And afterwards in the principal Caſe, Judgement was given for the Plaintiff.

Tryall.

Trin. 31. *Eliz.* In the Common Pleas.

CCIV. Hedd *and* Chaloners *Caſe.*

IN an Ejectione firmæ by Hedd againſt Chaloner upon a Demiſe for years of Jane Berd, It was found by eſpecial Verdict, That William Berd was ſeiſed in Fee, & made a Feoffment to the uſe of himſelf for life, and afterwards to the uſe of his two daughters Joan and Alice in fee, and dyed, and Joan entred

tred into the Land, and by Indenture by the name of Jane Berd, leased the same to the Plaintiff for three years. And it was further found; That Joan intended in the Feoffment, and Jane who leased, are one and the same person; Wray, It hath been agreed here upon good advice and Conference with Grammarians, that Joan and Jane are but one Name. And Women because (Joan) seems to them a homely name, would not be called Joan but Jane: But admit that they were several Names, Then he and Gawdy were of opinion, it should not be good: But afterwards, it was said by Gawdy, That this action is not grounded meerly upon the Indenture, but upon the Demise, and that is the substance, and the Indenture is but to enforce it, sci. the lease, 44 E. 3. 42. Another matter was moved here, the remainder was limitted to Joan and Alice in fee, by which they are Joint Tenents, and then when one of them enters, the same vests the possession in them both; Then by the demise of Joan a moyety passeth only to the Plaintiff. Wray, Here the Term is incurred. and the Plaintiff is to recover damages only, and no title at all is found for the Defendant, and so there is no cause but that Judgement should be given for the Plaintiff: and thereupon Judgement was given for the Plaintiff.

Trin. 31. *Eliz.* In the Kings Bench.

CCV. Read *and* Nashes *Case.*

IN an action of Trespass by Read and his Wife against Nash, for entring into a house called the Dayry-house, upon Not guilty pleaded, The Jury found this special matter, Sir Richard Gresham Knight, was seised in Fee of the Mannours of J and S and of diverse other Lands mentioned in his Will, and 3 Edw. 6. devised the same to Sir Thomas Gresham his Son for life, the Remainder to the first son of the said Sir Thomas Gresham in tail, the Remainder to the second son, &c. the Remainder to the third son, &c. The Remainder to Sir John Gresham his brother; Proviso, That if his Son go about or make any Alienations or discontinuance, &c. whereby the premisses cannot remain, descend and come, in the form as was appointed by the said Will, otherwise then for Joyntures for any of their Wives for her life only or leases for 21. years, whereupon the old and accustomed Rent shall be reserved, That then such person shall forfeit his estate, Sir John Gresham dyed: Sir Thomas Gresham his son, built a new House upon the Land: and, 4 Mariæ, leased to Bellingford for one and twenty years, rendring the antient Rent. And afterwards 2 Eliz. he leavyed a fine of the said Mannours and of all his Lands: and 5 Eliz. he made a Jointure to his Wife in this manner, sci, He covenanted with certain persons to stand seised to the use of himself, and his Wife for their lives, and afterwards to the use of his Right Heirs, and afterwards, 18. Eliz. he leased unto Read and his wife for one and twentie years to begin presently (which was a year before the expiration of the said Lease made unto Bellingford;) which Lease being expired, Read entred. It was argued by Cook, That here, upon the words contained in the Proviso, Sir Thomas had power and authority, not being but Tenant for life to make a Lease for years, or Jointure, and that upon implication of the Will, which ought to be taken and construed according to the intent of the parties; for his meaning was to give a power, as well as an estate, otherwise the word (otherwise) should be void; and it is to be observed, That the parties interessed in the said conveyance were Knights, and it is not very likely, That the said Sir Richard Gresham did intend, that they should keep the Lands in their own manurance as Husbandmen, but set the same to Farm for Rent. And it is great Reason, although he willed

that the order of his Inheritance should be preserved, yet to make a Provision for Jointure; and it is great reason and cause to his family to enable and make them capable of great Matches, which should be a strengthning to his posterity, which could not be without great Jointures, wherefore I conceive it reasonable to construe it so, That here they have power to make jointures for their Wives. It hath been said, That no grant can be taken by implication, as 12 E. 3. fit avor. 77. Land was given to I and A his wife, and to the heirs of the body of I begotten: and if I and A dy, without heir of their bodies, betwixt them begotten, that then it remain to the right heirs of I; and it was holden that the second clause, did not give an estate tail to the wife, by implication being in a grant, but otherwise it is in Case of a devise, as 13 H. 7. 17. (and there is no difference (as some conceive) when the devise is to the heir, and when to a stranger) but these cases concern matter of Interest, but our case concerns an Authority: and admit that Sir Thomas hath power and authority to make this lease, Then we are to consider if the Jointure be good, for if it be, Then being made before the Lease, it shall take effect before, and the woman Jointresse is found to be alive. But I conceive, That this Jointure is void, and then the Lease shall stand, for an use cannot rise out of a power, but may rise out of an estate of the Testator, and out of his Will, 19. H. 6. A man deviseth, That his Executors shall sell his reversion, and they sell by Word, it is a good Sale, for now the Reverstion passeth by the Will. But an use cannot be raised out of an use, and a man cannot bargain, and sell Land to another use then of the Bargainee. And it is like unto the case of 10 E. 4, 5. The disseisee doth release unto the disseisor rendring Rent, the render is void, for a rent cannot issue out of a right, so an use cannot be out of a Release by the disseisee, for such release to such purpose shall not enure as an Entry and Feoffment: Also here after that conveyance. Sir Thomas hath built and erected a New house, and no new Rent is reserved upon it, & therefore here it is not the ancient Rent, for part of the sum is going out of the new house. But as to that, It was said by the Justices, do not speak to that, for it appears that the Rent is well enough reserved. Another matter was moved for that, That a year before the Expiration of the Lease made to Billington this Lease was made to Read, for 21. years to begin presently from the date of it; although by the same authority he cannot make Leases in Reversion, for then he might charge the Inheritance in infinitum. But yet such a Lease as here is he might make well enough, for this Lease is to begin presently, and so no charge to him in the Reversion, as in the Case, betwixt Fox and Colliers, upon the Statute of 1 Eliz. A Bishop makes a Lease for three years before the Expiration of a former Lease to begin presently, It was holden a good Lease to bind the Successor for the Inheritance of the Bishop is not charged above one and twenty years in toto. But if a Bishop make a Lease for years, and afterwards makes a Lease for three lives, the same is not good, 8 Eliz. Dy. 246. Tenant in tail leaseth to begin at Michaelmas, next ensuing for twenty years, it is a good Lease by the Statute of 32 H. 8. so is a lease for 10 years, and after for eleven years, and yet the Statutes are in the Negative, but this power in our Case is in the Affirmative; and the Inheritance is not charged in the Whole with more then one and twenty years.

Use cannot rise out of a power.

Trinit. 31. *Eliz.* In the Kings Bench.

CCVI. Kinnersly *and* Smarts *Case.*

Debt upon a usurious Contract.

IN Debt upon a Bond, The Plaintiff declared, That the Bond was made in London; The Defendant pleaded, That an usurious Contract was made

made betwixt the parties at D in Stafford-ſhire, and that the Obligation was made for the ſame contract. The Plaintiff by Replication ſaith, that the Bond was made bona fide, & non pro uſura, and that Iſſue was tryed in the County of Stafford, and was found for the Plaintiff: And it was moved in arreſt of Judgement, that that Iſſue ought to be tryed in London, where the contract was made. Gawdy conceived, that the tryal is well. As 8 E 3. 8. In debt upon an Obligation in London, the Defendant pleaded, that the Obligation was made by dureſſee at York, the ſame Iſſue ſhall be tryed at York. At another day the caſe was put more certain, ſcil. that the contract was made at W in Stafford-ſhire, by which it was agreed, that for a Horſe and two Tun of Iron; the Plaintiff ſhould have for them and the forbearing of the money for ſuch a ſmall time fifty pounds; whereas in truth they were but of the value of forty pounds, and that the ſaid Bond was made for the payment of the ſaid fifty pounds. Cook, the Iſſue is well tryed, for the ground of the matter is the uſurious contract, and thoſe of Stafford-ſhire may better know it then they of London. And according to this Tryal it hath been before adjudged. H 28. Eliz. rot. 209. Betwixt Sybthorpe and Turner. And P 31. Eliz. rot. 303. betwixt Payne and Wilkenſon, where the Iſſue was, abſque hoc, that it was a corrupt agreement, but the pleading was, ut ſupra. And afterwards Judgement was given for the Plaintiff. Tryal.

Trin. 36. *Eliz.* in the Kings Bench.

CCVII. *The* Queen *and* Buckberds *Caſe*

The Queen recovered againſt Buckbeard in a Quare Impedit; and thereupon a Writ of Error was brought, and it was aſſigned for Error, that the Queen, poſt tempus ſemeſtre, had Judgement to recover damages for the value of the Church of half a year: Cook, the ſame is no Error as it was adjudged, 7 Eliz. 236. See alſo 34 H 1. 51. And theſe damages are not as damages, but as a penalty inflicted upon the diſturbance. See Book Entries, 483. The King in a Quare Impedit counted to his damage of forty pounds, and 484. 1000 li. and although, tempus ſemeſtre tranſierit, yet the King ſhall recover damages, but the value of the Church for half a year, for the King at all times may preſent in his own right; for nullum tempus occurrit Regi. At another day it was moved by Fenner Serjeant, and he conceived that here the Queen is not to recover damages, for ſhe doth not preſent in her own right, for the Incumbent had two Benefices without Qualifications, and therefore the firſt was void, and the Lapſe encurred, and therefore the Queen did preſent in the right of the Crown, and ſo is not verus Patronus. 14 E 3. Quare Impedit 54. The King ſhall not recover damages, although he count of damages, 3 H 6. Damages 17. And as to the caſe of 7 Eliz. it doth not appear there, that the King did preſent by reaſon of his Prerogative, and he ſhewed divers Preſidents, that the King ſhall not recover damages in ſuch caſe. P 7 H 5. rot. 402. 2 H 6. rot. 316. For the Statute was intended to give damages to the very Patron, and not otherwiſe. Cook, where the King preſents by Lapſe he is verus Patronus hac vice, as Grantee of the next Avoidance: Vide T. E 1. Quare Impedit 181. The King recovered damages in the caſe of a Prior. Godfrey ſaid, he had ſearched the Roll of 7 Eliz. and there is more reported in the Book then is in the Roll, for Judgement is given for the Preſentee, but as for the damages, the Court would adviſe of it. Gawdy, it is clear, that the Queen ſhall not recover double damages, for ſhe cannot looſe her preſentment, quia nullum tempus occurrit, and becauſe, eo quod tempus ſemeſtre tranſierit, but ſhe ſhall have ſingle damages, for they are given

Quare Impedit.

Damages in a *Quare Impedit* whereby King, & e contra.

Where only ſingle damages.

given for the wrong and disturbance, and not for the presentment; and therefore the damages are well awarded. Wray, If the King be not within one part of the Statute (as it is agreed as to the double damages) it is hard that he be within the other branch.

Popham Attorney general, The Queen ought to recover damages, but only single damages, but not double damages, and the words of the Statute are general, therefore the Queen shall have the benefit of it, and of all Statutes made for the benefit of the Subjects, the King shall take advantage: The Statute of Glouceſter gives damages in a Writ of Coſinage, Aiel, and Beſail, and the King brings an Action upon the ſeiſin of his Anceſtors, he ſhall recover damages, and in conſtruction of Statutes, the opinions of them which were next to the making of them is to be much reſpected: Vide 19 E 2. rot. 90. 19 E 1. rot. 255; 231, 136. And alwayes the King counts to his damage, &c. and that ſhould be in vain, if he ſhould not recover damages: And as to the Preſidents ſhewed to the contrary, that was the default of thoſe Clerks which the King had preſented, and when in a Quare Impedit the King had prevailed, they contented themſelves with the Incumbency without regard of the damages: But if damages be not to be given, yet the Judgement to recover the preſentment is not erronious. And the Judgement only as to the giving of damages ſhall be reverſed, and the Defendant in the Quare Impedit here ſhall not aſſign the ſame for Error, becauſe no damages are given, for it is for his advantage. And alwayes where it is found for the Queen in a Quare Impedit, they enquire of the value of the Church, which ſhould be a frivolous thing, if the Queen ſhould not recover damages. Gawdy, of things tranſitories the Queen may be diſturbed, and if ſhe be, wherefore ſhall ſhe not recover damages? but the doubt is, if the intent of the Statute be, if the party ſhall have ſingle damages in any caſe: And here in this caſe the Judgement is one and entire, and if it be reverſed in part it ſhall be reverſed in the whole; as in Dower, the Tenant pleads, that he is alwayes ready, &c. the Demandant ſhall have Judgement to recover her Dower, and a Writ ſhall iſſue forth to enquire of the damages. And ſee alſo 17 E 3. In an Aſſize of Dorrein preſentment, the Plaintiff had Judgement to have a Writ to the Biſhop: And the Aſſize was taken after for the damages: And in the mean time the Defendant brought a Writ of Error, and it was holden maintainable, for they are ſeveral Judgements; but it is not ſo here, for the Entry is, Quod querens habeat bre. Epiſcopo, & quia neſcitur quæ damna, &c. for it is one Judgement.

A man ſhall not aſſign for error, that which is for his advantage.

Wray, It is but one Statute, and therfore it ſhall be conſtrued with one conſtruction, and it ſhould be a ſtrange conſtruction, that the King ſhould be within one part of the Statute, and out of the other. And 34 H 6 3. The Kings Attorney could not have damages, which is a great proof and authority, that the Judgement for damages in ſuch caſe is Error: The experience and uſage of Law is ſufficient to interpret the ſame to us, and from the time of E 3. until now, no damages have been given in ſuch caſe. Thrice this matter hath been in queſtion, 1. 3 H 9. and the Juſtices there would not give damages; 34 H 6. there the Counſel learned of the King, could not have damages for the King. And 7 Eliz. there was no damages: And whereas it hath been ſaid, that a man ſhall not have a Writ of Error, where Judgement is given for his benefit, that if Judgement be entred that the Defendant be in Maner. where it ought to be, Capiatur, yet the Defendant ſhall have a Writ of Error: And he conceived alſo, that here is but one Judgement: Clench, the firſt Preſident after the making of that Statute was, that damages were given for the King in ſuch caſe; but afterwards the practice was alwayes otherwiſe, and that the ſaid Statute could not be conſtrued, to give in ſuch caſe damages, and the reaſon was becauſe the Juſtices took the Law to be otherwiſe: And the King is not within the Statute of 32 H 8. of buying of Tythes, nor any

Subjects

Subjects who buyeth any title of him: And here in our caſe, the Queen is not verus Patronus, but hath this preſentment by Prerogative: And if title do accrue to the Biſhop to preſent for Lapſe, yet the Patron is verus Patronus.

At another day the caſe was moved, and it was ſaid by Wray, that he had conferred with Anderſon, Manwood, and Periam, who held, that the Queen could not have damages in this caſe, but Periam ſomewhat doubted of it. Gawdy, in 22 E 4. 46. In Dower the Demandant recovered her Dower, and damages by verdict, and afterwards for the damages the Judgement was reverſed, and ſtood for the Lands. Clench, it ſhall be reverſed for all, for there is but one Judgement. And afterwards Judgement was given, and that the Queen ſhould have a Writ to the Biſhop and damages. Popham, The Court ought not to proceed to the examination of the Errors, without a Petition to the Queen, and that was the caſe of one Mordaunt, where an Infant levyed a Fine to the Queen, and thereupon brought a Writ of Error, and afterwards by the Reſolution of all the Judges, the proceedings thereupon were ſtayed. See 10 H 4 148. a good caſe.

Trin. 31. *Eliz.* in the Kings Bench.

CCVIII. Chapman *and* Hurſts *Caſe.*

BEtwixt Chapman and Hurſt the Defendant did libell in the ſpiritual Court, for Tythes againſt the Plaintiff, who came and ſurmiſed, that whereas he held certain Lands by the leaſe of Sir Ralph Sadler for term of yeares within ſuch a Pariſh, that the now Defendant being Farmor of the Rectory there: The Defendant, in conſideration that the Plaintiff promiſed and agreed to pay to the Defendant ten pounds per annum, during the Term, for his Tythes, he promiſed, that the Plaintiff ſhould hold his ſaid Land without Tythes, and without any ſute for the ſame, and thereupon prayed a Prohibition: And by Gawdy; the ſame is a good diſcharge of the Tythes for the time, and a good Compoſition to have a Prohibition upon; and and it is not like unto a Covenant. See 8 E 4. 14. by Danby. Tythes.

Trin. 31. *Eliz.* in the Common Pleas.

CCIX. Kirdler *and* Leverſages *Caſe.*

IN Avowry the caſe was, that A ſeiſed of Lands leaſed the ſame at Will, rendring rent ten pounds per annum, and afterwards granted eundem redditum, by another deed to a ſtranger for life, and afterwards the leaſe at will is determined. Periam was of opinion, that the Rent did continue, and although that the words be, eundem redditum, yet it is not to be intended, eundem numero, ſed eundem ſpecie, ſo as he ſhall have ſuch a Rent, ſcil. ten pounds per annum: As where the King grants to ſuch a Town, eaſdem libertates quas Civitas Cheſter habet, it ſhall be intended ſuch Liberties, and not the ſame Liberties, ſo in the principal caſe: Alſo he held, that a Rent at will cannot be granted for life, and therefore it ſhall not be meant the ſame Rent: But it was afterwards adjudged, that the Rent was well granted for the life of the Grantee. Avowry.

Trin.

Trin. 31. *Eliz.* In the Common Pleas.

CCX. Heayes *and* Alleyns *Case.*

Cui in vita. HEayes brought a ſur cui in vita againſt Alleyn. And the caſe was this, The Diſcontinuee of a Meſſuage, had other Lands of good and indefecible tytle adjoining to it, and demoliſht and abated the ſaid houſe, and built another which was larger, ſo as part of it extended upon his own Land, to which he had good title. And afterwards the heir brought a ſur cui in vita, and demanded the houſe by the Name of a Meſſuage, whereas part of the houſe did extend into the Land to which he had no right. And by Periam, The Writ ought to be of a Meſſuage with an Exception of ſo much of the houſe which was erected upon the ſoyl of the Tenant, as demand of a Meſſuage except a Chamber: And it was argued by Yelverton, That the Writ ought to abate, for if the Demandant ſhall have Judgement according to his Writ, then it ſhall be entred quod petens recuperet Meſſuagium, which ſhould be Erronious, for it appeareth by the verdict it ſelf, that the demandant hath not title to part of it; and therefore he ought to have demanded it ſpecially, 5 H. 7. 9. parcel of Land, containing 10. Feet. 16 E. 3. Br. Mortdanc. of a piece of Land containing ſo much in breadth, and ſo much in length. And the moyetie of two parts of a Meſſuage, and 33 E. 3. br. Entrie 8. a Diſſeiſor of a Marſh ground made Meadow of it, Now in a Writ of Entry it ſhall be demanded for Meadow. Drue Serjeant contrary, and he confeſſed the Caſes put before, and that every thing ſhall be demanded by Writ in ſuch ſort, as it is at the time of the action brought: as a Writ of Dower is brought of two Mills, whereas during the Coverture they were but 2 Tofts; but at the day of the Writ brought, Mills; and therefore ſhall be demanded by the name of Mills, 14 H. 4. 33. Dower 21. 13 H. 4. 33. 175. 1 H. 5. 11. Walmeſly, part of a Meſſuage may be demanded by the Name of a Meſſuage: and if a Houſe deſcend to two Coparceners, if they make partition that one of them ſhall have the upper Chamber, and the other the lower, here if they be diſſeiſed, they ſhall have ſeveral Aſſiſes, and each of them ſhall make his plaint of a Meſſuage, and by him a Chamber may be demanded by the name of a houſe. And afterwards the Writ was awarded good but a ſpecial Judgement was given ei, quod querens recuperet Meſſuagium prædict. viz, ſo many feet in length, and ſo many in breadth, according to that which was found by the Verdict.

Demand, and the manner of it, in a writ.

Trin. 31. *Eliz.* in the Common Pleas:

CCXI. Degory *and* Roes *Caſe.*

Debt. DEgory brought Debt upon an Obligation againſt Roe, as heir to his Anceſtor, The defendant pleaded, That his Anceſtor by his deed did covenant with Sir W. Winter, and A. Marſh, to ſtand ſeiſed to the uſe of himſelf for life, and afterwards to the uſe of the Defendant, and his heirs, and ſo he had nothing by deſcent, The Plaintiff replicando ſaid, non convenit; and it was found by ſpecial verdict, That ſuch a deed of Covenant was made by the Anceſtor of the Defendant, but the firſt uſe was limitted to the Covenantor and his wife, for their Lives, &c. And that he delivered the ſame to J S as his deed, to the uſe of the ſaid Sir W. Winter, and the ſaid Marſh, if the ſaid Sir W. Winter would agree to the ſame, and take the charge of it upon him, and if he will not agree, That then it ſhould not be his deed, and further

further found, That Sir W. Winter dyed before any agreement, and it was moved by Periam, If the same be presently the deed of the Ancestor, or if it do not take effect till the condition be performed, sci. untill Sir W. Winter hath agreed to it. See 14 H. 8. 17, 18, 19, 20, 23. And by Walmesly. The same is not the Deed of the Ancestor untill Sir William hath agreed; But by Anderson and Periam, although Sir William Winter doth not agree to it, Yet it is the deed of Roe, for although a deed be upon condition, ut supra, yet because he delivered it as his deed, and the Condition is subsequent to it, It shall be taken for his deed, and the condition after shall be void, because repugnant: For although that in Estates limited to men, the estate may be precedent, and the condition subsequent, and the not performance of the condition may destroy the estate, for the estate is alwaies subject to the condition, yet it is not so in Deeds, for being once the deed of the party, it can never cease to be his deed, after it is once delivered as his deed. Owen, Although the same be the deed of the party, yet it is not well pleaded, and he conceived the issue is found against him, for the Covenant is pleaded, to stand seised unto the use of himself for life, the Remainder over: To which the Plaintiff Replicando saith, non convenit, so as the Issue is, if any such Deed of Covenant was, and the Jury finde, That the Covenant was to stand seised to the use of himself, and his wife, &c. so as it is not such a deed as the Defendant hath pleaded, for other estates are limitted by it, and therefore it shall not be intended the same deed. Periam, The same is not materiall, for the substance of the Plea is, Nothing by discent, &c. and it was adjourned.

Deeds, when to take effect.

Trin. 31. *Eliz.* In the common Pleas.

CCXII. *The Schollars of* All-soules *in* Oxford, *and* Tamworths *Case.*

IN a Writ of Right by the Colledge of All-souls in Oxford against Tamworth: the Writ was, Quod clamat tenere de nobis in liberam puram et perpetuam Elemosinam. And exception was taken to it, because it ought to be in liberam Eleemosinam, sans pura & perpetua, also it ought to be Eleemosina, with a Double e, and not Elemosina, with a single e, but the exception was not allowed. For as to the first Exception, it is but surplusage, and as to the other, It is the common course. Another exception was taken to the Writ, because the words are quod clamat esse jus & hæreditatem suam, without saying in jure Collegii: Anderson, The Writ is good enough. If a Parson plead that he is seised, he shall say in jure Ecclesiæ, for he hath two capacities, and without such words here shall be intended seised in his own Right, But if an Abbot plead that he was seised, there needs not such words for he hath no other capacity, so of Dean and Chapter; Mayor and Comminalty: And afterwards, the Writ was awarded good, and that the Tenant should answer over, &c. See Book Entries 236, 237 It was also moved, If the Colledge shall count of its seisin within 30. years, because that the Corporation never dyes, and then if he count of its own possession, the same is without limitation. And it was holden, that if the Guardian of the Colledge which now is, was ever seised, he ought to count upon a seisin within thirty years; But upon the seisin of his Predecessor he ought to count of a seisin within 60 years as another common person, for the change of the Welle of such a seisin, is as the dying seised, and discent of a common person.

Writ of Right

Trin.

Trinit. 31. *Eliz. in Communi Banco.*

CCXIII. *The Lord* Buckhurſt *and the Biſhop of* Wincheſters *Caſe.*

Quare Impedit. THe Lord Buckhurſt brought a Quare Impedit againſt the Biſhop of Winc. and counted, that he was ſeiſed of the Mannor of D, to which the Advow-ſon was appendant, and that the ſaid Church became void, and that he preſented Maurice Sackvill his Clark. The Defendant pleaded, that he was ſeiſed of the ſaid Advowſon, as in groſſe, and preſented one Maurice Sacvill, abſque hoc, that the Advowſon was appendant. It was moved, that the Defendant ought to traverſe the Preſentment, and not the Appendancy, eſpecially as the cauſe is here, where they both preſent one and the ſame perſon, to which it was ſaid, that that doth not appear, for the Defendant hath pleaded, that he preſented Maurice Sackvill, but doth not ſay, prædict. Maurice Sackvill, ſo as it may be he is not the ſame perſon, but another. See 10 H 7. 27. the Traverſe is well taken contrary, where the Plaintiff declares of an Advowſon in groſſe, and that he to the ſame preſented, and the Defendant pleadeth, that he is ſeiſed of ſuch a Mannor to which the Advowſon is appendant, &c. without that, that the Advowſon is in groſſe, there he ſhall traverſed the preſentment, for the preſentment ſhall make it in groſſe. See 13 H 8. 12.

Trin. 32. *Eliz.* in the Common Pleas.

CCXIV. Jennings *and* Winches *Caſe.*

Aſſumpſit. IN an Action upon the Caſe by Jennings againſt Winch. The Plaintiff declared upon an Aſſumpſit by the Defendant, 1. Maii 32. Eliz. and counted upon a Mutuatus for twenty ſhillings, and an Indebitatus for four pounds. The Defendant pleaded, that he being endebted to the Plaintiff in five pounds, and W S in another five pounds, they became bounden to the Plaintiff in twenty pounds for the payment of ten pounds in ſatisfaction of the ſaid ſum of five pounds, and five pounds, and that the Obligation was ſealed before the day of the Aſſumpſit ſuppoſed, and added, that the ſame is the ſame debt, and that the Obligation was made for the ſame debt. And by the opinion of the whole Court, the ſame cannot be a good plea, for an Obligation cannot detain a Contract or an Aſſumpſit afterwards made. And the truth of the matter was, that the Obligation was made after the Aſſumpſit, although that the Plaintiff declared of an Aſſumpſit made after. And in that caſe it was holden, that the Defendant might plead the ſpecial matter; that the Obligation was made after the ſaid Aſſumpſit, abſque hoc, that he Aſſumpſit, &c.

Trin. 32. *Eliz.* In the common Pleas.

CCXV. Hawkins *and* Lawſe *Caſe.*

Debt. HAwkins brought an Action of Debt againſt Lawſe, Executor of one A, for Rent reſerved upon a Leaſe for years made to the Teſtator. The Defendant pleaded, fully adminiſtred, and upon the Evidence it appeared, that the ſaid A made the Defendant his Executor, and that he did meddle with the poſſeſſion

poſſeſſion of divers goods of the Teſtator, and ſo adminiſtred, and afterwards refuſed in Court; and that the Adminiſtration was afterwards committed to one B, and that the Inventory of the goods of the Teſtator came to one thouſand pounds: And it was given in Evidence for the Defendant, that he himſelf had paid certain debts, and that divers perſons have recovered againſt the Adminiſtrator divers ſums of money amounting to one thouſand pounds, & ultra; And it was moved, if that evidence did maintain the Iſſue for the Defendant, becauſe that the Defendant had pleaded, plene adminiſtravit, which implies an Adminiſtration by himſelf. And now upon the Evidence it appeareth, that the greateſt part of the goods of the Teſtator were adminiſtred by the Adminiſtrator.

Periam, If that Adminiſtrator (who in truth is but a ſtranger) pay any debts with the goods of the Teſtator without commandment of the Executor, the ſame is not an Adminiſtration, and the Executor cannot give ſuch matter in Evidence, to prove his plea of fully adminiſtred. Drew Serjeant, If an Executor of his own wrong, meddle with the goods of the Teſtator, and afterwards the Adminiſtrator meddle with the reſidue and adminiſter them: In Debt againſt the Executors, who pleads fully adminiſtred, if he can prove that he himſelf hath adminiſtred part, and the Adminiſtrator the Reſidue, the ſame is good Evidence to maintain his Iſſue. Periam, It may be ſo there, but here in our caſe, the Defendant is the very Executor, and he hath adminiſtred, in which caſe afterwards he cannot refuſe; and ſo the Adminiſtration is not well committed, and is granted without cauſe; and he to whom the Adminiſtration is committed is a meer ſtranger, and what he did was without warrant; and therefore it is no Adminiſtration to prove the Iſſue: And then the whole matter by direction of the Court was found by ſpecial verdict: And by Periam, in this caſe an Action may be brought, either againſt the Executor of his own wrong, or the Adminiſtrator, but not againſt both of them joyntly. See 21 H. 6. 8. by Yelverton and Portington: Periam, If the Teſtator mortgages a Leaſe for yeares and dyes; and the Executors redeem it with their own monies, the ſaid Leaſe ſhall be Aſſets in their hands, for ſo much as the ſame is worth, above the ſum which they have paid for the redemption of it. Adminiſtration.

Trin. 32 *Eliz.* in the Common Pleas.

CCXVI. Ivory *and* Fryes *Caſe.*

IT was ruled by the whole Court in this caſe: That if A make B his Executor, and B makes C his Executor and dieth, and a Debt is due to A the firſt Teſtator. If C bring an Action of Debt for the ſaid debt, as Executor to B, the Writ ſhall abate: It was moved, if an Infant within the age of one and twenty years makes his Executor, & adminiſtration is committed, durante minore ætate, in whoſe name the Action ſhall be brought, in the name of the Infant, or the Adminiſtrator. Periam, If he will be proved before the Adminiſtration be committed, the Action ſhall be brought in the name of the Infant Executor.

Trinit. 32. *Eliz.* In the Common Pleas.

CCXVII. Reade *and* Johnſons *Caſe.*

IN an Action upon the Caſe betwixt Read and Johnſon, the Plaintiff declared that where the Defendant was endebted to him, he aſſumed to pay it: And Aſſumpſit.

upon Non Assumpsit pleaded, this special matter was found, that the Plaintiff leased unto the Defendant certain Lands for yeares, rendring rent eight pounds per annum, and that the said Rent was behind for three yeares, and that the Defendant was not otherwise endebted to the Plaintiff, nor made any other promise but the contract upon the Reservation of the Rent: And by the clear opinion of the whole Court, the Action doth not lye, because he hath a proper Action, scil. an Action of Debt, in which no wager of Law lyeth.

Trin. 32. *Eliz.* in the Common Pleas.

CCXVIII. Wright *and the Bishop of* Norwiches *Case.*

Quare impedit.

IN a Quare Impedit betwixt Wright and the Bishop of Norwich, it was moved, if the King hath title to present for Lapse, and presents; and his Clerk is admitted and instituted, but not inducted, and dyeth before Induction. If now the King shall present for the said Lapse, because the Church was not full against the King. And the Justices were all clear of opinion, that the King might repeal such presentment before induction, and as to the principal matter, the Court seemed to incline, that the King might present again.

Mich. 30. and 31. *Eliz.* In the Common Pleas. *Intrat. Trin.* 30. *Eliz. Rot.* 1160.

CCXIX. Whiskon *and* Cleytons *Case.*

Devisers.

IN an Ejectione firmæ, upon a special verdict found, the case was this, That C was seised in Fee, and devised the same to Solomon Whisker his God-son after the death of his Wife, and if he fail, then he willed all his part to the discretion of his Father, and dyed; Solomon survived, the Father being dead before without any disposition of the Land. Gawdy was of opinion, that upon those words, that the Father had a Fee-simple, as, I will that my Lands shall be at the disposition of I S, by these words, I S hath a Fee-simple, quod Periam concessit; and they amount to as much as, I will my Land to I S to give and sell at his pleasure: And by Windham and Periam, there is no difference where the Devise is, that I S shall do with the Land at his discretion, and the devise thereof to I S to do with it at his discretion.

CCXX. *Mich.* 31. *Eliz.* in the Common Pleas.

A leased to B for years, and before the expiration of the said Term leased the same by Indenture to a stranger to begin presently, and the first Lessee committed Waste. A brought an Action of Waste against the second Lessee, and declared upon a Lease made for yeares without speaking of the Indenture. And Gawdy Serjeant demanded the opinion of the Court, if the Defendant might safely plead no Waste? And they conceived, that it should be dangerous so to do. Then it was demanded, if the Defendant plead, that the Plaintiff had nothing, tempore dimissionis, whereof he had counted, if the Plaintiff might estop the Defendant by the Indenture, although he had not counted upon it, and if such Replication be not a departure. And it seemed to Periam, and Leonard, Custos brevium, that it was not, for it is not contrary to the Declaration, but rather doth enforce the Declaration.

Mich.

CCXXI. *Mich.* 31. *Eliz.* in the Common Pleas:

WAlmesley Serjeant demanded the opinion of the Court upon this matter. Land is given to Husband and Wife in special tail (during the Coverture) they have issue, the Husband is attainted of Treason and dyeth, the Wife continues in as Tenant in tail, the issue is restored by Parliament, and made inheritable to his Father, saving unto the King all advantages which were devoived unto him by the Attainder of his Father, the Wife dyeth. And he conceived, that the issue was inheritable, for the Attainder which disturbed the inheritance is removed, and the blood is restored, and nothing can accrue to the King, for the Father had not any estate forfeitable, but all the estate did survive to the Wife, not impeachable by the said Attainder. And when the Wife dyeth, then is the Issue capable to enherit the estate tail. Windham and Rhodes, prima facie, thought the contrary, yet they agreed, that if the Wife had suffered a common Recovery, the same had bound the King.

CCXXII. *Mich.* 31. *Eliz.* in the common Pleas.

IN an Action upon the Case the Plaintiff declared, that he had delivered to the Defendant, diversa bona ad valentiam 10 li. the Defendant in consideration thereof did promise to pay to the Plaintiff the debt owing, pro bonis prædictis, and did not shew, that the Defendant bought the said goods of the Plaintiff, and so it doth not appear that there was any debt; and then a promise to pay it, is meerly void, which was agreed by the whole Court. Assumpsit.

Mich. 31. *Eliz.* in the common Pleas.

CXXIII. Seaman *and* Brownings *Case.*

GEorge Seaman brought Debt upon a Bond against W Browning and Others, Executors of one Marshal; the condition was, that where the said Marshal had sold certain Lands to the Plaintiff, if the said Plaintiff peaceably and quietly enjoy the said Lands against the said Marshal, &c. and assigned the breach in this, that the said Marshal had entred upon him, and cut down five Elmes there, upon which the parties were at issue; And it was found, that A, servant of the said Marshal, by commandment of his said Master, had entred and cut, &c. in the presence of his said Master, and by his commandment, for he is a principal Trespassor; And it was so holden by the Court. Debt.

CCXXIV. *Mich* 31. *Eliz.* in the common Pleas.

IF the Kings Tenant by Knights service dyeth, his Heir within age, and upon Office found the King seiseth the body and Land, yet the Heir during the possession of the King may sell the Lands by Deed enrolled, or make a Lease of such Land, and the same shall bind the Heir notwithstanding the possession of the King; but if he maketh a Feoffment in Fee, it is utterly void, for the same is an intrusion upon the possession of the King; but where the King by Office found is entituled to the Inheritance, as that his Tenant dyeth without Heir, whereas it is false, for which the King seiseth, in such case the Tenant of the King, before his Ouster le mayne, cannot make a Lease for

yeares,

yeares, or sell the Land by Deed enrolled: The Case depended in London before the Judges of the Sheriffs Court. The King, by colour of a false Office, which doth falsly entitle him to the Inheritance, is seised of certain Land; he who hath right leased the same for yeares by Deed indented; and then an Ouster le mayne was sued, and he enfeoffed a stranger And it was holden, that the Lease should not bind the Feoffee, although it was by Deed indented, for the Feoffee is a stranger to the Indenture, and therefore shall not be estopped by it. 18 H 6. 22. A stranger shall not take advantage of an Estoppel, and therefore shall not be bound by it: As if one take a Lease for yeares by Indenture of his own Lands, the same shall bind him, but if he dyeth without Heir, it shall not bind the Lord in payment of Escheat.

Mich. 31. *Eliz.* In the common Pleas

CCXXV. Gibbes *Case.*

Trover and Conversion

GIbbs brought an Action upon the Case upon Trover and Conversion of a Gelding; and the Case was, that one P had stolen the said Horse, and sold the same unto the Defendant in open Market, by the name of Lister, and the said false name was entred in the Toll-book. And it was holden clear by the Court, that by that sale the property was not altered.

CCXXVI. *Mich.* 31. *Eliz.* in the common Pleas.

TEnant in Socage leased his Lands for four yeares, and dyed, his Heir within the age of eight yeares, the Mother being Guardian in Socage, leased the Land by Indenture to the same Lessee for fourteen years; It was holden by the Court, that in this Case the first lease is surrendred, but otherwise upon a Lease made by Guardian by Nurture.

Mich. 31 *Eliz.* in the Common Pleas:

CCXXVII. Kimpton *and* Dawbenets *Case.*

IN Trespasse, the Defendant did justifie by a grant of the Land, where, &c. by Copy: The Plaintiff by Replication saith, that the Land is customary Land (ut supra) and claimed the same by a former Copy: The Defendant by Rejoynder saith, that well and true it is, that the Lord may grant Copyes in possession at his pleasure, and also estates by Copy in Reversion, with the assent of the Copy-holder in possession, but all estates granted by Copy in Reversion without such assent, have been void. It was argued, that this custom is not good, for it is not reason, that the Lord in disposing of the customary possessions of his Mannor should depend upon the will of his Tenant at will, and the same is not like to the case of Attornement, for there the Attendancy is to be respited, which is not to be done here, for the Copy-holder in possession shall continue Attendant to his Lord, notwithstanding such a grant in Reversion, and see for the unreasonablenesse of the custome, 19. Eliz. 357. in Dyer, Sallfords Case: It was moved on the other side, that the Custome was good enough; and 3 H. 6. 45. was vouched, That every Freehold of a Mannour upon alienation might surrender his Land, &c. It was adjourned.

Mich.

Mich. 30, & 31. *Eliz.* in the Exchequer-chamber.

CCXXVIII. Marriot *and* Paſcalls *Caſe in a Writ of Error.*

RObert Marriot one of the Attorneys of the Court of Exchequer, brought an Ejectione firmæ againſt Mary Paſcall, and upon Not guilty pleaded, the Jury found a ſpeciall Verdict, containing this matter; viz. That King H. 8. the fourth year of his Reign erected and founded an Hoſpitall, by the name of the Maſter and Chaplains of the Hoſpitall of King Henry the eighth, de le Savoy: And afterwards in the time of Queen Mary, the ſaid Maſter and Chaplains being ſeiſed, &c. leaſed the ſame to the Defendant by the name of W. Holgill Maſter of the Hoſpitall, Henrici nuper Regis Angliæ ſeptimi vocat le Savoy & Capellani Hoſpitalis prædict. And afterwards by the former name (which was in truth their very name) leaſed the ſame to Thomas Fanſhaw, who leaſed the ſame to the Plaintiff: And if the Leaſe aforeſaid made unto the Defendant in form and by the name aforeſaid, be a good Leaſe, was all the queſtion. And this matter was argued, and many times debated in the Exchequer, as well at the Bench as at the Bar. And it was agreed by Clerk and Gent, Barons there, That the ſaid Leaſe made to the Defendant was utterly void by reaſon of the Miſnoſmer. Manwood argued ſtrongly to the contrary; and Judgment was given for the Plaintiff, according to the opinions of the ſaid two Barons: Upon which the Defendant brought a Writ of Error in the Exchequer-chamber before the Lord Chancellor, Treaſurer, &c. And now this Term it was argued by Godfrey on the part of the Defendant: Three variances have been ſuppoſed in this Leaſe from the Originall Foundation of the Hoſpitall in the name of it. 1. The name of the Foundation is the Maſter of the Hoſpitall, &c. Et Capellani dict. Hoſpitii; So that in the Leaſe reſts part of the name (Capellani) as not immediately annexed to Maſter, as it is in the name of the Foundation. But as to that point, the Juſtices Aſsiſtants delivered Godfrey from the arguing of it, as of a variance not materiall: Another variance hath been objected, becauſe that in the Foundation the words are Hoſpitalis Regis H. 7. and in the Leaſe the words are, Hoſpitalis Henrici ſeptimi nuper Regis Angliæ, ſo as this word (Nuper) is Surpluſage, and ex abundant. But of that matter he was alſo diſcharged, becauſe it is no variance in ſubſtance: But all the difficulty reſted in this, that in the Foundation the words are (de le *Savoy*) and in the Leaſe (vocat le *Savoy*) And he put the Caſe 4 Mar. Dyer 150. The Colledge of Eaton was incorporated by the name of Præpoſiti & Collegii regalis *S.* Mariæ de Eaton juxta Windſor, and a Leaſe is made by the name Præpoſiti & ſociorum Collegii regalis de Eaton, and that was holden a void Leaſe: And I confeſs that in the names of Corporations, we ought to reſort to the Foundation of the Corporations, for the name of a Corporation is as a name of Baptiſme, and ought to be as preciſely obſerved, but that ought to be intended in matter of ſubſtance, and not otherwiſe, vide 10 Eliz. Dyer 278. The Dean and Chapter of Carlile was incorporated by the name of Decanus & Capital. Eccleſiæ Cathedralis *Stat.* & individua Tri. Carl. and they make a Leaſe by the name, Decanus Eccleſiæ Cathedralis *S.* Trin. in Car. et totum Capit. de Eccleſia prædict. And the ſame was holden a good Leaſe, notwithſtanding that variance, which is not in ſubſtance of the name. And the Dean and Chapter of Peterborow was incorporated by the name of Decanus et Capital. Eccleſiæ Petriburgenſis, and they made a Leaſe by the name Decanus et Capitulum Eccleſiæ de Peterborow, and holden good enough, becauſe the variance was not in any matter of ſubſtance: And he cited the Caſe betwirt Croft and Howell, 20 Eliz. Plow. *Com.* 537. The Cooks of London were incorporated by the name of Maſters, and Governors, and

Miſnoſmer of a Corporation.

and Commonalty of the Mystery of Cooks, and they by the Name of Master and Wardens of the said Craft and Mystery of Cooks made a Conveyance, and it was holden that the variance assigned in the abundance of this word (Craft) in the Conveyance, which was not in this Corporation, was not any material variance, but only matter of surplusage, for (Craft) and (Mystery) are all one, and of one sense, &c. And so in the principal Case, The Hospital de le Savoy, and the Hospital vocat. le Savoy, found the same, and in effect do not differ. And as it was said by the Lord Chief Baron in his Argument in the Court of Exchequer, in this case, four things are only to be respected in the Name of a Corporation: First the Name of the living persons who are the Corporation, as in our Case the Master and Chaplains: Secondly, the house in which they are resident, and make their abode: Thirdly, The Name of the Founder: Fourthly, the place upon which the place of their abode is built and erected. And if these four matters are sufficiently set down, although not formally, it is good enough. It hath been objected, That the Hospital de le Savoy, and the Hospital vocat le Savoy, do much differ, for de le Savoy, implieth the demonstration of the Place, but vocat le Savoy, trencheth only to the Name, As if the Dean and Chapter de Pauls in London, make a Lease by the Name of Dean and Chapter of Saint Paul vocat. London, so if the Master and Fellows of Trinity College in Cambridge make a Lease by the Name of Master and Fellows of Trinity College vocat. Cambridge, such Leases are utterly void. I do well agree those Cases, for the Dean and Chapter is not all London, but part of London, and therefore cannot be called or said London, and so Trinity College is but part of Cambridge, and therefore cannot be called Cambridge, but here in our case, The Hospitall is not parcel of the Savoy, but the whole Savoy is the Hospitall, and there is not any part of the Savoy, which is not the Hospital; But if Trinity College in Cambridge make a Lease by the Name of Master and Fellowes Collegii vocat. Trinity College in Cambridge, it is a good Lease: And he put a difference, where the word in the Name of the Corporation, which precedes (de) is all one, and of the same Nature with the word which followes (de) and where on the contrary, as in our case, The word which precedes (de) is Hospital, and the words which follow (de) are le Savoy: are all one and the same thing, so as the Hospital and Savoy, are all one and the same, and therefore may be well called Le Savoy, and also (de) and (vocat.) in construction are the same, and so our Lease is good enough: and it is found by verdict, That this Hospital was erected upon the Mannour of Savoy, and thereupon it is now commonly called Le Savoy, without any addition of Hospitall, for as it was called Savoy before it was erected into an Hospital, so it is also called after the Erection, and true it is that the misnaming of a Corporation in any smal thing shall abate a Writ, for there is only delay, yet it is not of force in a Conveyance, unless the misnaming be in a point material. Coke to the contrary, The variance from the true Name of a Corporation which shall prejudice a Conveyance ought to be in matter of substance, for variance in matter of form and circumstance will not hurt it, sed parum differunt quæ re concordant. And first it is to be confessed, That the Name of a Corporation is as the Name of Baptism, which admits of no variance, and therefore it is said 38. E 3. 15. by Knivet, when a Man founds a Chantry or a house, &c. it ought to bear such Name as his Founder hath given to it, for that is its proper name. And so it hath been Reported by Bendloes, Serjeant, 4. and 5. Phi. and Mar. That it was holden for a positive Law, by all the Judges of England, That the mistaking of the Name of a Corporation in any matter of Substance, makes the Conveyance utterly void, for a name is given to a Corporation upon the Foundation, and that by the same Name they shall implead and be impleaded, but that ut idem nomen, et sub eodem nomine sint habiles ad perquireand. & concedend. to be impleaded, and to

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implead, but that is to be meant idem re, for it is not necessary, that it be idem littera, for, qui hæret in littera, hæret in Cortice, but if it be idem re with the Foundation it is well enough. And therefore it hath been adjudged, That where the Colledge is incorporated by the Name of Maſters and Fellows, Collegii St. & individ. Trinit. in Cantabridg. and they make a Lease by the Name of Collegii Trinit. this is good enough, for the word Trinity, implies, and imports St. & individ. And therefore such variance was holden not material. But here in our case is a variance in Substance, betwixt the Name given to the Hospital upon the foundation, and the name usurped in the Lease. And the same will clearly appear upon my Argument, viz. If the Name given to this Hospital upon the foundation of it, and the Name usurped in the Lease be not unum in sensu (not in your private understanding as private persons, but in your judicial knowledge upon the Record quod coram vobis residet, as Judges of Record) then this lease is void, For although you as private persons, otherwise then by Record, know, That the Hospitall of Savoy, and the Hospital vocat. le Savoy, are all one Hospital; you ought not upon that your private knowledge to give Judgement, unless also your judicial knowledge agree with it; that is, the knowledge which is out of the Records which you have before you: But if the Name given upon the Foundation, and the usurped Name be not idem sensu in your Judicial knowledge, and you cannot otherwise conceive the Identity of these two Hospitals, nor make any Construction to imagine it but by the Record, for the Record is your eye of Justice, and you have no other eye to look unto the cause depending before you, but the Record, and to this purpose he cited the case of 7 H 4. 108. Where a man killed another in the presence of a Judge travailing on the way where the murther was, And at the next Assises in the said County before the same Judge, another man is indicted of the same murder, and arraigned, and convicted by verdict; In that case, The Judge he ought not to carry himself according to his private knowledge, which he hath of the said fact, sci. to acquit the Prisoner, but all that he can do is to respite Judgement against the party, because of the Judges knowing to the contrary, and to make further Relation thereof to the King for his Pardon of grace for the Party. So in our Case, It may be that you in your private knowledge know, That the Hospital de le Savoy, and the Hospital vocat. le Savoy, is all one, but that doth not appear unto you upon the Record which is before you, but it may be for any thing that appears in the Record, that they are diverse and several Hospitals; Therefore the Lease is void. To prove my Minor, I do say that this word (de) as here, de Savoy, designes a place, so as by this Word (de) the place is become parcel of the Name, but this word vocat. locum non denotat, but onely the very name, and so here is a material difference and variance, for here by pretence of the Name in this Lease, there is not any place of the Corporation in the Name, but the Corporation is transitory, which cannot be, for a Corporation especial consisting of many persons, as Corpus aggregatum ought to have a certain place of their abiding, or otherwise it cannot be discerned by the Law, and it is but a Mathematical thing, and nothing else but a fiction, and they cannot be otherwise considered in Law, but as they are circumscripti within the bounds of their house, and they cannot appear but by Attorney: and if a Prebend consist upon a Manor, and afterwards the Manor by Writ be demanded against the Prebend, and he loose it, here he hath lost his Name, because he hath lost that which giveth to him his Name, by contrary by Blayke for his estate and place, in the Chapter, doth remain unto him: And secondly, for another Cause here is a material variance, for this word (de) supposeth a place before the Foundation, as the place upon which the Hospitall was erected was called Le Savoy before the Erection of it; but these words (vocat. le Savoy) supposeth the same Name Savoy was imposed upon the Foundation; Thirdly, these words (de le Savoy) do import the

Hoſpitall to be part of the place, which before the Foundation, was called *Savoy*, but vocat. trencheth only to all the place called *Savoy*: Fourthly; (de le *Savoy*) is matter of certainty and verity; (vocat.) but matter of Reputation. And ſo for theſe four reaſons, great difference in ſubſtance appeareth betwixt the very name of the Hoſpital, and the Name uſurped in the Leaſe. And he cited the Caſe 29 Eliz. in the Kings Bench betwixt Hall and Wingat. King E. 4. did incorporate the Dean and Cannons of Windſor, by the Name of Dean and Cannons of the King and Queens Free Chappel of Saint George the Martyr within his Caſtle of Windſor; and made a Leaſe by another Name, viz. by the Name of Dean and Cannons of the King and Queens Free Chappel there, and the ſame Leaſe was made in the time of Queen Mary, and it was holden that the ſame was a variance in Subſtance. And he cited another Caſe 30. Eliz. in the Kings Bench betwixt Fiſher and Boys. A College in Oxford was by Act of Parliament incorporated by the Name of Warden and Scholars, Domus ſive Collegii *Scholarium* de Merton in univerſitate Oxoniæ, and they made a Leaſe by the Name Cuſtos Domus ſive Collegii de Merton in Oxonia, and *Schollares* ejuſdem domus, and the variance in that point, becauſe in the very name of the Foundation, Domus ſive Collegii *Scholarium* de Merton, and in the uſurped name in the Leaſe Domus ſive Collegii de Merton, was holden material, and the true name was de Merton in univerſitate Oxoniæ, but in the Leaſe, in Oxonia only, leaving out the word Univerſity, and the ſame was holden a variance in ſubſtance: For Oxford doth contain in it ſelf the Univerſity, which is a thing of it ſelf, and alſo the City is a thing by it ſelf: and it may be that there is a College in the City called Merton College, and alſo a College which is called by ſuch Name in the Univerſity: and ſo in our Caſe, it may be that there is an Hoſpitall which is called the *Savoy*, and alſo another which is Le Savoy, and then the Court ſhall be enveigled, &c. And in the end of the Argument, the Lord Treaſurer, which was the Lord Burleigh, put this Caſe, which was adjudged in his time. The Guild of Boſton in Lincolnſhire, was incorporated by the Name of the Guild of St. Nicholas, and our Lady the Virgin Mary, &c. and they made a Leaſe for years by the Name of the Guild of our Lady the Virgin, and Saint Nicholas, Religione quadam motus ut nomen Virginis Mariæ, in charta dimiſſionis, proponeretur nomini Sancti Nicholai; and it was adjudged a void Leaſe for the variance aforeſaid. And afterwards at another day, the matter was argued by Atkinſon, on the part of the Defendant. Starkey 21 E. 4. 56. ſaith, That the Name of the Corporation, by which it is incorporated, is as properly the Name of a Corporation, as the Name of Baptiſm is the Name of a ſingle and individual perſon, and yet there is a great difference in the miſpriſion of them, for the Name of Baptiſm doth conſiſt of one word, and therefore it cannot admit of any variance, but the name of a Corporation doth conſiſt of many words: in which caſe variance in words which are ſupplyed by other words, and not in matter of ſubſtance ſhall not hurt; and that hearing is notably diſcuſſed in the caſe of the Cooks of London, cited before by Godfrey. Four things are to be conſidered in the Name of a Corporation, which are of the Eſſence and Subſtance of it: Firſt, the perſons incorporated, of which the Corporation doth conſiſt, as here the Maſter and Chaplains de Savoy. Secondly, The quality of the Corporation, as Dean and Chapter, Mayor and Commonalty: Thirdly, the Patron or Founder, as, Merton College; Fourthly, The Place whereupon the Corporation is founded; as to this laſt point, ſee 31 E 3. 28. and fo. 15. by Knivet, and ſee 6 Eliz. Dyer. King H 8. erected the Dean and Prebend of Cheſter, by theſe words, ſci. Decanus et Capit. Cathedralis Eccleſiæ Chriſti, et Sanctæ Mariæ Virginis Ceſtriæ. And afterwards by Letters Pattents, gave to the ſaid Dean and Chapter, certain Manners, Decano et Capitulo Eccleſiæ Cathedralis Chriſti et Sanctæ Mariæ Virginis, by us before erected, and

that

that grant was holden void, becauſe that the place where, &c is not expreſſed in the ſaid Letters Pattents, for Ceſtria is the local place of the Incorporation. And as to the Objection made upon the word (de) that this word (de) goeth onely to part, and (vocat.) goes to the whole, and ſo here is a great difference; the ſame is not any reaſon, for this word (de) extends as well to the whole as to part. As a Kent granted percipiend. de Manerio de D. the ſame ſhall go to the whole Mannor, 5 E 4, 5. ad reſpondendum I. Abbati Monaſterii Sanctæ Mariæ Ebor. where the Obligation was, Abbati Monaſterii Sanctæ Mariæ Virginis extra mare Ebor. and yet the Writ was well enough, notwithſtanding ſuch variance, a fortiori, in the caſe of a conveyance and Intereſt. And I conceive that it appeareth in the Record; That the Leaſe given in evidence of the part of the Defendant, is a Leaſe made by the Maſter and Chaplains of the Hoſpitall of the Savoy, for it is found by verdict, That King Henry the eighth, upon the Scite of the Mannour of Savoy, betwixt the houſe of the Biſhop of Worceſter, and the houſe of the Biſhop of Carliſle, and that it was incorporated by the Name, &c. and that afterwards Q Mary by her Letters Pattents, reciting the foundation of the ſaid Hoſpitall called the *Savoy*, and lamenting the Ruin of it, being ſurrendred in the time of E. 6. did reſtore it, by which it appeareth, That the Hoſpitall of the Savoy, and Hoſpital called the Savoy is one and the ſame in reſpect of the Bounds, Foundation, and Scituation. And in the whole courſe of our Bookes, no caſe can be found, That any Corporations have avoided their own acts, by ſuch cauſe of Miſnomer, nor of ſuch matter, is any queſtion moved in our Books. And as to that which hath been objected, That although the Judges in their private knowledge well know, That the Houſe de le *Savoy*, and the Houſe vocat. the Savoy, be all one, yet they ought not to judge according to ſuch their private knowledge, but according to their judicial knowledge, which they have out of the Record. I conceive, That the Judges of neceſſity ought to uſe in ſuch caſes their private knowledge: as where Miſnomer of a Colledge was objected, viz. Trinity Colledge in Cambridge, where it was incorporated by the Name of Maſters, Fellows, and Schollars Collegi Sanctæ & individuæ Trinitat. and they made a Leaſe by the Name of Maſter, Fellows, and Schollars of the Colledge of Trinity, the ſame was holden a good Leaſe, for the Judges knew well enough, That this word Trinity doth imply in it ſelf Sancta & individua, but by what knowledge? not by their judicial knowledge, but by their private knowledge. So in our caſe, Egerton the Queens Sollicitor to the contrary: It is a clear and plain Rule in our Law, That the name of a Corporation is as a name of Baptiſm to a natural man, and if there be any difference, I conceive, that the Law requires more ſtrickt certainty in the name of a Corporation then in the Name of any particular perſon, For a name is more neceſſary to a Corporation then to another, for when an infant is born, he is preſently a perfect creature, before any name given him, and the giving of the Name is not a matter of neceſſity, but of policy for diſtinction, &c. but in the caſe of a Corporation, The Name is the ſubſtance and eſſence of it, and it is not a Body before a Name be impoſed upon it, and therefore in the Charters of Corporations there is alwaies ſuch a clauſe, per tale nomen implacitare, & implacitari, acquerire, &c. poſſint, and without their Name, they are but a Trunck: but contrary in the caſe of particular perſons; land is given primo genito filio J S; It is a good gift, although there be no Name of Baptiſm: Lands given omnibus filiis J. S. is a good name of purchaſe, and if a man be bound in an obligation by a wrong or falſe Name, and in an action brought upon the ſame, if it appeareth upon evidence, that he was the ſame perſon which ſealed and delivered it, the ſame is ſufficient, and the Bond ſhall binde him. But contrary in the caſe of a Corporation, and we cannot give any thing to a Corporation by circumſtances, enduring or implying

ing their true name. As Land given to the firſt Hoſpitall which the Queen ſhall found, although that it ſufficiently appear, That ſuch a one was the Hoſpital which the Queen firſt founded, yet the gift is void: And he denyed, That the four things remembred before are neceſſarily required in the Name of a Corporation: for if the Queen will found a Corporation, as an Hoſpital by the Name of Utopia, the ſame is well enough without any reſpect of perſons, place, Founder,&c. ſet forth in the Charter. And alſo other things beſides the ſaid four things are ſometimes neceſſary in a Corporation; As if the Queen will found an Hoſpitall by the Name, Quod fundavimus ad roga. Chriſt. Hatton Cancel. Angliæ. all the ſame ought to be expreſſed in every grant made by, or to the ſaid Hoſpitall; So, Quod fundavimus ad relevandum pauperes; and ſometimes the number of the perſons incorporated, if it be in the Charter, it ought to be uſed in all acts made by or to them; As Maſter and ſix Chaplains, ſo as the ſaid four things recited before, are not ſo neceſſary in the Name of a Corporation, but ſo far forth as they are parcel of the Name given to them in the Charter of the Corporation: And in our caſe, 1. The place de le *Savoy*, is part of their name, ſet down in the charter of their Corporation, and therefore the ſame ought to be preciſely followed, and he relyed much upon the argument of Cook in noting material variances, betwixt de le *Savoy*, and vocat. le Levoy, as (de) ſignifies part (vocat.) the whole (de) ſignifies the place de facto: vocat. implyes reputation onely. There is a place near unto Whitehall called Scotland, becauſe that the Kings of *Scotland*, when they came to our Parliament uſed there to reſide, as the Lord Treaſurer affirmed, There is alſo a place in England called Normandy, and another called Callais, and alſo a place here in Weſtminſter called Jeruſalem, but theſe, Scotland,&c. but by Reputation, ſo as what difference is betwixt the very *Scotland* and *Scotland* here, &c. ſuch and ſo much difference is there betwixt the Hoſpital de le *Savoy*, and the Hoſpital vocat. the *Savoy*. And as to that which hath been objected by Atkinſon, That this word (de) ſignifies as well the whole as part, as a Rent granted percipiend. de Manerio de D. I confeſs that this word (de) hath many ſignifications, ſo that we ought not onely to conſider what (de) ſignifyes of it ſelf, but rather to obſerve what goes before, what follows; for, as ſaith Hillary, intelligentia verborum ex cauſa dicendi ſumenda eſt. And this word (de) is a material word in the Name of a man, therefore alſo in the name of a Corporation, 26 H. 6. 31. Aſſiſe by J. de *S.* and it was found for him, and afterwards the Tenant in the Aſſiſe brought attaint, and in the rehearſall of the Aſſiſe in the writ of attaint he was named I. *S.* leaving out (de) and for that cauſe the Writ did abate. 28 E. 3. 92. Debt brought by the Executor of John Holbech, where the Teſtament was John de Holbech, and for want of this word (de) in the Writ, it was abated by Award. And in a Præcipe quod reddat, againſt Mich. de Triage, he caſt a Protection for Michael Triage, leaving out (de) and for ſuch variance the Protection was diſallowed, and a Petit cape awarded. And although the Judges in their private knowledge knew well enough, That the Hoſpitall de le *Savoy*, and the Hoſpital vocat. the *Savoy*, be all one, yet in point of Judgement they ought not otherwiſe receive information, but out of the Record, and therefore, if ſufficient matter be not within the Record to inform the Judges of the Identity of the ſaid two Hoſpitalls, their private knowledge ſhall not avail. And he cited the caſe of the Lord Coniers, where the Parties being at iſſue, and the Jury charged for the tryal of it. It was found by ſpecial verdict, That a fine was levyed of the Lands in Queſtion, &c. but nothing found of the proclamations, whereas in truth, the proclamations were as well given in evidence as the fine, But found, Quod finis levatus fuit pro, ut per recordum finis ipſius, in evidenciis oſtenſum, plenius apparet. Now in that caſe, although that the Juſtices, knew well enough, That the Proclamations were expreſſely given in evidence, yet

yet becauſe it did not appear unto them as Judges out of the Record, They would not give Judgement, according to the truth of matter, but according to the Record, for they cannot take notice if the Proclamations be in Chirographers Office or not, But after it appeared unto them, That that defect was but a ſlip of the Clerk, they commanded the Record to be brought before them, and the proclamation to be inſerted in the verdict. And then gave Judgement according to the verdict reformed as aforeſaid, and as to the Caſe of Martin College cited before, he ſaid he was of Counſel in it, and he knew, That the Judgement there was not given for the cauſe alledged by Cook, but becauſe that this word, Schollars, was left out in the Leaſe. And he held, that if in the principal Caſe, the Leaſe had been, That the Maſter and Chaplains of the houſe called the Hoſpital of the Savoy, &c. it had been well enough, for there is, de le Savoy, See a good caſe 36 H 6 fitz. Brief. 485. by Danby a Corporation cannot be Tenants of Lands, but according to their Corporation, and their foundation, and their very Name, nor they cannot be impleaded, nor take Lands by a wrong Name, nor purchaſe, nor diſpoſe of their poſſeſſions, but by their true Name. And afterwards the matter was compounded by the mediation of Friends: and Fanſhaw had the Leaſe for a certain ſum of money. See now Cook 10. Reports. The Caſe of the Mayor and Burgeſſes of Lyn Regis: See alſo c. 11. p Doctor Arays Caſe, to this purpoſe.

Mich. 30, & 31 *Eliz.* in the Common Pleas.

CCXXIX. Huſon *and* Webbes *Caſe.*

Debt lieth not againſt Executor of an Adminiſtrator.

RObert Huſon brought an action of Debt againſt Anne Webbe, Adminiſtratrix of Joan Webbe, and declared of a Contract without ſpecialty. The Defendant pleaded, That ſhe had fully adminiſtred, and it was found againſt her. And now it was moved for the Defendant, That upon the matter an action of Debt doth not ly againſt the Executor or Adminiſtratrix: which was granted by the Court; But the doubt was, If now, foraſmuch as the Defendant by pleading the plea above, hath admitted the action, ſhe ſhall now take advantage of the Law in that point. For the reaſon why this action doth not ly againſt an Executor or Adminiſtrator is, becauſe the Teſtator himſelf might have waged his Law, if he had been impleaded upon it, and by intendment of Law the Executor or Adminiſtrator cannot have notice of ſuch a debt, or of the diſcharge of it; But now by anſwering to the Declaration as above, the Defendant hath taken notice of the Debt, and in manner confeſſed it. And by Rhodes and Anderſon, Judgement ſhall be given againſt the Plaintiff, becauſe it is apparent to the Court, that the action doth not ly. And by Anderſon, if Judgement be entred againſt the Adminiſtratrix, in ſuch an action upon Nihil dicit, the Court, ex officio, ſhall give judgement againſt the Plaintiff. Periam and Windham doubted at the firſt that the Defendant by her plea had admitted the whole matter upon the ſpecialty adminiſtred, pleaded, and had taken notice of the Debt, 41 E. 3. 13. 46. E. 3. 10, 11. 13 E. 4. 25. 13 H. 8. Fitz. Execut. 21. And afterwards Anderſon, ex aſſenſu of the other Judges; cauſed to be entred, Querens capiat nihil per breve.

Mich.

Mich. 30, & 31. *Eliz.* In the Common Pleas. *Intrat. Mich.* 29. & 30. *Eliz.*

CCXXX. Hambleden *and* Hambledens *Case.*

Deviſes. THe caſe was, William Hambleden the Father of the Plaintiff, and the Defendant, was ſeiſed of the Lands, &c. And by his Will devtſed to his Eldeſt Son, Black Acre; to his ſecond Son, White Acre; and to his third Green Acre, in tail. And by his ſaid Will further willed, That in Caſe any of my ſaid Sons do dy without iſſue, that then the Survivors be each others heir, The Eldeſt ſon dyeth without iſſue. &c. It was moved by Gawdy Serjeant, That the ſecond Son ſhall have Black Acre in tail, and he cited the Caſe 30 E 3. 28. propinquioribus hereditatibus de ſanguine puerorum, for the conſtruction of ſuch deviſes. Walmeſley argued, That both the ſurviving brothers ſhould have the ſaid Black Acre, for the words of the deviſe are quilibet ſupervivens, which amounts to uterque; and the Court was in great doubt of this point. And they conceived, That the eſtate limitted in Remainder to the Survivor &c. is a fee-ſimple by reaſon of the words, Each others heir, and alſo they conceived, That both the Survivors ſhould not have the Land, for the ſame is contrary to the expreſſe words of the deviſe, The Survivor ſhall be each others heir, in the ſingular number, ſee 7 E 6. br. Deviſe 38. A man ſeiſed of Land hath iſſue three Sons, and deviſeth part of his Lands to his ſecond Son in tail, and the reſidue to his third ſon in tail: and willeth, That none of them ſhall ſell the Land, but that each ſhall be heir to the other, The ſecond ſon dyeth without iſſue, the ſame Land ſhall not revert to the eldeſt Son, but ſhall remain to the third ſon, notwithſtanding the words each ſhall be heir to the other.

Mich. 30. & 31. *Eliz.* In the common Pleas.

CCXXXI. Slywright *and* Pages *Caſe.*

Maintenance. AN Information was in the Common Pleas, by John Slywright againſt Page, upon the Statute of 32 H 8, of Maintenance, and declared that the Defendant took a Leaſe of one Joan Wade, of certain Lands, whereas the ſaid Joan was not ſeiſed nor poſſeſſed thereof according to the Statute; and upon Not guilty, the Jury found this ſpecial matter, That Edmund Wade was ſeiſed, and made a Feoffment in fee, thereof unto the uſe of himſelf, and of the ſaid Joan, who he then intended to marry, and the heirs of the ſaid Edmund. The mariage took effect, Edmund enfeoffed a Stranger, who entred, Edmund dyed: Joan not having had poſſeſſion of the ſaid Land after the death of Edmund her husband, nor being now in poſſeſſion, by Indenture demiſed the ſaid Land to the Defendant for years, without any Entry or delivery of the Indenture upon the Land, The ſaid Defendant knowing the ſaid Joan never had been in poſſeſſion of the ſaid Land: and alſo the Defendant being brother of the half blood to the ſaid Joan. The firſt Queſtion was If the Leaſe being made by one out of poſſeſſion, and not ſealed or delivered upon the Land, and ſo good in Law as to paſſe any intereſt, be within the Statute aforeſaid. And the whole Court was clear of opinion that it was: for by colour of this pretended Leaſe, ſuch might be undertaken and advanced to the trouble and diſquiet of the poſſeſſion, for amongſt the vulgar people, it is a Leaſe, and it is a Leaſe by Reputation: Another matter was moved, becauſe that the entry of the wife is now made lawfull by 32 H. 8. and then ſhe might well diſpoſe of the Land. But

But as to that, It was said by the whole Court, That the meaning of the Statute was to repelle the practises of many, That when they thought they had title or right unto any Land, they for the furtherance of their pretended Right conveyed their interest in some part thereof to great persons, and with their countenance did oppresse the possessors: And although here the Lease was made by the said Joan to her Brother of the half blood, yet by the clear opinion of the Court the Lease is within the danger of the Statute, and yet in some Case the Son may maintain his Father, and the Kinsman his Kinsman. And note in this case it was holden by the Justices, That of necessity it ought to be found by verdict, That the Defendant knowing that the Lessor never had been in possession. And Judgement was given for the Plaintiff.

Mich. 30, 31. *Eliz.* in the Common Pleas:

CCXXXII. Brokesby *against* Wickham *and the Bishop of* Lincoln.

Quare impedit.

IN a Quare Impedit, the Plaintiff counted, That Robert Brokesby was seised of the Advowson, and granted the next Avoidance to the Plaintiff, and Humphrey Brokesby, and that afterwards the Church became void, and after during the avoidance, Humphrey released to the Plaintiff, and so it belongs to him to present. And upon this count the Defendant did demur in Law. For it appeareth upon the Plaintiffs own shewing, that Humphrey ought to have joined with the Plaintiff in the action, for the Release being made after the church became void, is not of any effect, but utterly void. So is the grant of the presentment to the Church where the Church is void, for it is a thing in action. See the Lord Dyer, 28 H. 6. 26. 3 Ma. Dyer 129. 11 Eliz. Dyer 283. Walmesley Serjeant put this Case, Two Joint-tenants of a Rent, the one may release to the other, but if the Rent be behinde, now the one cannot Release his Interest in the Arrearages to the other. And afterwards in the Principall case Judgement was given that the Release was void.

Mich. 30, & 31. *Eliz.* in the Common Pleas. *Intr. Trin.* 29. *Eliz. Rott.* 721.

CCXXXIII. Sammes *and* Paynes *Case.*

Tenant by the curtesie.

IN an Ejectione firmæ the case was, That the Mother being seised of certain Lands, had issue two Daughters, and by Indenture covenanted with diverse persons to stand seised to the use of Eliz. her eldest daughter in tail, upon condition that the said Eliz. should pay to her other daughter within a year after the death of the Mother, or within a year after the said other daughter should come to the age of eighteen years 300 l. And if the said E should fail in the payment of the sum aforesaid, or should dy without issue before such payment, then to the use of the said second daughter in tail, The Mother dyeth, E taketh a Husband, hath issue, and afterwards dyeth without issue before the day of payment. And if the Husband shall be tenant by the curtesie or not, was the Question, And by the Court clearly, he shall be, For as to the condition of payment of the said Sum; The same is not determined; for she dyed without issue before the day of payment, sci. before the second Daughter came of the age of eighteen years; and as to that there is no condition broken; and as to the point of dying without issue, The same is not a condition, but

but rather a Limitation of the Estate, and the same is no more [illegible] the Law saith, and the estate tail in Elizabeth, is spent and determined by the dying without issue; and doth not cease, or is cut off by any Limitation; and afterwards Judgement was given for the Tenant by the curteous [illegible] by Anderson; If a Feoffment be made to the use of J S and his heirs, until J D hath done such a thing, and then unto the use of J D and his heirs, the thing is done, and J S dyeth, his wife shall be endowed.

Mich. 30, & 31. *Eliz.* In the Common Pleas.

CCXXXIV. Bowry *and* Popes *Case.*

BOwry brought an action upon the Case against Pope, and declared, that in the time of E.6. The Dean and Chapter of Westminster, leased two houses in Saint Martins in London to Mason for sixty years, The which Mason, leased one of the said Houses to one A and covenanted by the Indenture of Lease with the said A, that it should be lawful for the said A, his executors, and assigns to make a window in the shop of the house so to him assigned, & afterwards in the time of Queen Mary, a window was made accordingly, where no window was there before. And afterwards A. assigned the said house to the Plaintiff. And now Pope having a house adjoining, had erected a new building super solum ipsius Pope ex opposito the said new Window, so as the New Nusance. Window is thereby stopped. The Defendant pleaded, Not guilty, and it was found for the Plaintiff; and it was moved for the Defendant in arrest of Judgement, that here upon the Declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the Plaintiffs own shewing to be of late erected, sci. in the time of Queen Mary, The stopping of which by any act upon my own Land, was holden lawfull and justifiable by the whole Court. But if it were an antient window time out of memory, &c. there the light or benefit of it ought not to be impaired by any Act whatsoever; and such was the opinion of the whole Court. But if the case had been, That the house and soyl upon which Pope had erected the said building, had been under the estate of Mason, who covenanted as aboveSaid, Then Pope could not have justified the nusance, which was granted by the whole Court.

Mich. 30. & 31. *Eliz.* In the Common Pleas. *Intrat. Mich.* 29. & 30. *Eliz. Rott.* 1737.

CCXXXV. Lee *and* Maddoxes *Case.*

Covenant. WIlliam Lee brought a Writ of Covenant against Richard Maddox, and Isabel his wife, and declared. That one Errington the first husband of the said Isabel was endebted to the Plaintiff in 20 l. and that one George Ashley was also endebted to the said Errington, in the like sum of 20 l. And also that the said Errington made and constituted the said Isabel his Executrix, and dyed, and afterwards the said Isabel by Indenture dum ipsa sola fuit, reciting that whereas her said late husband was endebted to the Plaintiff in the sum aforesaid and whereas the said George Ashley was also endebted unto her said late husband in the like sum, Now for the better satisfaction of the Plaintiff for his said debt, she appointed and constituted the Plaintiff, atturnatum suum irrevocabilem ad petendum, levandum, recuperand. & recipiend. ad usum suum proprium in nomine dict. Issabellæ de dicto Georgio, the said twenty pounds; And the said Isabel covenanted, quod ipsa ad requis. dict. quer. de tempore in tempus, adjuvaret, & manu teneret quamlibet et omnes sectam & sectas

sectas quam vel quas dictus quærens commensaret & prosequeretur in nomine dictæ Isabelæ, against the said George, to the use of the Plaintiff. Non existendo Non-suit voluntarie, or making any Discontinuance, Release, Revocations, Anglice Countermand, without the assent of the Plaintiff: And declared further, that the Plaintiff had brought a Suit against the said George for the said Debt, and shewed all in certain. And that the said Isabel, depending the said Suite, had taken to Husband the Defendant without the assent of the Plaintiff: And if by this Marriage the said Suit be Countermanded was the Question. And first it seemed to the Court that the Declaration was insufficient, because there is not any request surmised in the Declaration, for the words of the Covenant are, Quod ipsa ad requisitionem, &c. So as it seemed to the Justices, that the Plaintiff ought to have notified to Isabel that he had commenced such Suite, otherwise the Action will not lye. And also the Court was of opinion, that here is not any Countermand, for by the taking of the Husband the Writ is not abated, but onely abateable; and therefore the Plaintiff ought to have shewed, that by the taking of the Husband, the Writ by Judgment was abated, otherwise it is not any Countermand, and then no cause of Action.

Countermand.

Request.

Mich. 30, & 31 *Eliz.* in the Common Pleas.

CCXXXVI. Salway *and* Lusons *Case.*

MAtthew Salway brought a Writ of Right against Luson, and the Writ was, Messuag. & 200. acr. jampnor. & brueræ: And exception was taken to the Writ, because jampnor. & brueræ, are counted together, where they ought to be distinguished severally, As so many acr. jampnor. & so many acr. bruer. although it were objected on the part of the demandant in the maintenance of the Writ, that in the Register the Writ of Right is reditu unius libræ of Cloves & Mace together, without distinction or severance. And it was said, that in a writ of Right we ought to follow the Register, and therefore a Writ of Right was abated, because this word (Pomarium) was put in the Writ, for in the Register there is no such Writ, because the word Gardinum comprehends it: But in other Writs, as Writs of Entry, &c. it is otherwise. See the Case of the Lord Zouch, 11 Eliz. 353. In a Writ of Entre sur disseisin mille acr. jampnor. & bruer. But this exception was not allowed, for it may be that jampnor. & bruer. are so promiscuous that they cannot be distinguished: Vide 16 H. 7. 8. 9. The respect the Justices there had to the Register, so as they changed their opinions and confirmed the same to the Register. Another exception was taken to the Writ, because thereby the Demandant doth demand Duas partes Custodiæ del Hay in the Forrest of C. And the Court was of opinion that the Writ ought to be Officium Custodiæ duarum partium de Hay, &c. and not Duas partes Custodiæ, As Advocationem duarum partium Ecclesiæ, And not Duas partes Ecclesiæ. Another Exception, because the Writ was, duas partes, &c. in tribus dividend. where it should be Divis. for Dividend. is not in any Writ, but onely in a Writ of Partition; And by Windham the parts of this Office are divided in Right, which the Court granted. Another Exception was taken, because that in the Writ it is not set down in what Town the Forrest of C. is, so as the Court doth not know from whence the Visne should came: For no Venire shall be de vicineto Forestæ, as de vicineto Hundredi, & Manerii; And the same was holden to be a materiall Exception. Another Exception was taken, because a Writ of Right doth not lye of an Office: for at the Common Law an Assise did not lye of it, but now it doth by the Statute of West.

Writ of Right

Abatement of a Writ.

Visne.

2. Cap. 25. for it was not Liberum ten. but the party grieved was put to his Quod permittat: And of this opinion was the whole Court.

Mich 30. & 31. *Eliz.* In the common Pleas.

CCXXXVII Smith *and* Lanes *Case.*

Copyholder determined by acceptance of a Leafe.

THe Queen was ſeiſed of a Mannor whereof bl acr. was holden by Copy in Fee; the Queen leaſed bl. acr. to B. for one and twenty years, who aſſigned the ſame to the Copyholder, who accepted of it. The Queen granted bl. acr. to C. in Fee, the terme expired, C. entered, and his entry was holden to be congeable, for by acceptance of the ſame Terme, the Cuſtomary Eſtate was determined, as if the Copyholder had accepted it immediatly from the Queen: It was alſo holden by the Court, that a Leaſe for yeares under the Seale of the Exchequer may be pleaded, and that without making mention of the Commiſſion, by which the Court of Exchequer is authorized to make ſuch Leaſes: And ſo are all the Preſidents as well in this Court as in the Court of Exchequer. And whereas the Court was upon the point of giving their Judgment, It was objected by Shuttleworth Serjeant, That here is pleaded a Bargaine and Sale of Land, without ſaying, Pro quadam pecuniæ ſumma: And he ſtood much upon the Exception, and the Court alſo doubted of it, and demanded of the Preignothories what is their forme of pleading: And by Nelſon chief Preignothory; theſe words Pro quadam pecuniæ ſumma, ought to be in the pleading. Scot Preignothory contrary. Anderſon conceived it was either way good, but Pro quadam pecuniæ ſumma is the beſt: And ſo Lennard Cuſtos Brevium conceived. And the opinion of the Juſtices was, that a Bargaine and Sale for divers Cauſes and Conſiderations is not good without a ſumm of money. And by Windham, Bargaine and Sale Pro quadam pecuniæ ſumma, although no money be paid, is good enough, for the payment or not payment is not traverſable: And by Periam, If Pro quadam pecuniæ ſumma be not in the Indenture of Bargaine and Sale, yet the payment thereof is averrable. And for this Exception the Judgment was ſtayed.

Bargain and Sale, and conſideration of it.

Mich. 30. & 31 *Eliz.* In the Exchequer Chamber.

CCXXXVIII Bedell *and* Moores *Case.*

Action upon the Caſe for not performing an Award.

BEdle brought an Action upon the Caſe againſt Moore in the Kings-bench, and declared, That the Defendant did aſſume to performe the Award of J.S. and aſſumed alſo, that he would not ſue Execution upon a Judgment which he had obtained againſt the Plaintiff in an Action of Account, &c. And ſhewed further, that the Award was made, &c. (which Award in Law was utterly void) and that the Defendant had not performed the ſaid Award, and alſo that he had ſued Execution againſt the Plaintiff. The Defendant pleaded Non-aſſumpſit, and it was found for the Plaintiff, and Judgment given accordingly. Upon which Moore brought a Writ of Error in the Exchequer-chamber, upon the Statute of 27 Eliz. And aſſigned Error, becauſe the Plaintiff had declared upon two Breaches, whereas for one of them there was not any cauſe of Action. for the Award is void in Law, and then no breach could be aſſigned in that: and then when the Jury hath aſſeſſed Damages intirement for both breaches, whereas for one there was not any cauſe of Action by the Law, the Verdict was void, and then the Judgment given upon it reverſable; for it is not reaſon that the Plaintiff have Damages for ſuch matter for which the Law doth not give an Action.

Error.

And

And if the Jury had assessed damages severally, viz. For the not perfor- Damages.
mance of the Award so much, and for the suing forth Execution so much, then the Judgement had been good, and the damages assessed for the not perfor-mance, &c. void. Manwood Chief Baron: The verdict is well enough for here the whole Assumpsit is put in issue, and there is but one issue upon the whole assumpsit, but if several issues had been joined upon these severall points of the Assumpsit, and both had been found for the Plaintiff and da-mages, assessed entirely for both breaches, then was the Judgement rever-seable, for being several issues the Jury might have assessed the dammages severally, sci. for each issue several dammages, but here is but one issue, and it was the folly of the Defendant that he would not demur in Law upon the Declaration for one part, sci. the not performance of the Award, and tra-verse the other part, sci. The suing of the Execution, or the Assumpsit of it. And in our case, it may be that the Jury did assesse the damages for the suing of the Execution without any regard had to the performance of the Award: And note that the verdict for assessing of the Damages was in these Terms, sci. Et assidunt damna occasione non performationis Assumpsionis prædict. &c. And Cook who was of Councel in this Case, put this Case. The late Earl of Lincoln, Admiral of England, brought his action of Scandalis Magnatum, and declared, That the Defendant exhibited in the Star-chamber against him a Bill of Complaint, containing diverse great and infamous slanders: viz. That the said Earl was a great and outragious oppressour, and used out-ragious oppression, and violence against the Defendant, and all the Coun-try also. The Defendant pleaded, Not guilty, and found for the Plaintiff, and assessed damages, and it was moved in stay of Judgement, first, That the Plaintiff had declared upon matter of slauder for part, for which an acti-on lyeth, and for part not. For for the oppression supposed to be made to him self, no action lyeth because every subject may complain for wrong done unto him, and although he cannot prove the wrong, an action will not ly. But as for the oppression done to others by the supposal of the Bill an action lyeth, for what is that to him, he hath not to do with it, for he is not pars gravata. But because the Jury assessed Damages entirement, the Judgement was arrested, for the cause aforesaid. And afterwards in the principal case, the last day of this term, Judgement was staied.

Hill 31 *Eliz.* in the Kings Bench.

CCXXXIX. Palmer *and* Thorps *Case.*

BEtwixt Palmer and Thorpe, the Case was this, A man demised his Man- Devises.
nour of M for thirty two years, and the day after let the same Mannour for fourty years, to begin from Michaelmas, after the date of the first Lease, and the Tenant attorned. And by Cook the same is a good grant although to begin at a day to come, for it is but a Chattel; and so was the opinion of Wray Chief Justice, for a Lease for years may expect its com-mencement, as a man seised of a Rent in Fee grants the same for twenty years from Michaelmas following, and good, for no estate passeth presently, but only an Interest. See 28 H. 8. 26. Dyer.

Hill. 31. *Eliz.* In the Kings Bench. *Rot.* 668.

CCXL. *Sir* Anthony Shirley *and* Albanyes *Caſe*,

Aſſumpſit.

IN an action upon the Caſe, upon Aſſumpſit by Sir Anthony Shirley against Albany. The Plaintiff declared, That he was ſeiſed of the Manor of Whittington for the term of his life, the Reverſion to the Earl of Arrundell in Fee, and ſo ſeiſed, ſurrendered all his Eſtate to the ſaid Earl, who afterwards by his Deed granted a Rent-charge of 40 l. per ann. out of the ſaid Manor to him, and afterwards conveyed the Manor to the Defendant in Fee. And afterwards, 27 Maii 22. Eliz. upon a Communication betwixt the Plaintiff and the Defendant concerning the ſaid Rent: the Defendant did promiſe to the Plaintiff, that if the Plaintiff would ſhew unto the Defendant any Deed, by which it might appear that he ought to pay to the Plaintiff ſuch a Rent, he would pay that which is due, and that which ſhould be due from time to time. And further declared, that 27 April, 27 Eliz. he ſhewed unto the Defendant a Deed, by which it appeared that ſuch a Rent was granted, and due. And for eighty pounds due for the two laſt years, he brought the Action; The Defendant pleaded, that after the ſaid promiſe, and before the ſhewing of the ſaid Deed, ſc. 14. Jan. 22 Eliz. the Plaintiff entred into the ſaid Land, and leaſed the ſame for three years: The Plaintiff Replicando ſaid, that 1. Decem. 27 Eliz. the Defendant did re-enter, upon which they were at Iſſue, and it was found for the Plaintiff. It was moved by Glanvil Serjeant, that by the entry the Promiſe was ſuſpended, and being a perſonall thing once ſuſpended, it is alwaies extinct. Wray, the Action is brought for the Arrerages due the two laſt years, and ſo at the time of his re-entry the Plaintiff had not cauſe of Action, and therefore it could not be ſuſpended. Gawdy, When the Plaintiff ſheweth the Deed, the Defendant is chargable to arrerages due before and after the promiſe: wherefore if the entry maketh a ſuſpending of the Rent, the ſuſpenſion doth continue: but I conceive here is not any ſuſpenſion, for this promiſe is a meer collaterall thing, and ſo not diſcharged by the entry unto the Land, for it is not iſſuing out of the Land: But if the Plaintiff before the Deed ſhewed had releaſed all Actions, the ſame had been a good Bar, and I conceive that the Deed was not ſhewed in time, for it ought to be ſhewn before any arrerages due after the promiſe, but here it is ſhewn five years after: But that was not denied by all the other Juſtices. Another exception was taken, that where the promiſe was, that if the Plaintiff ſhewed any Deed by which it might appear, that the Defendant ſhould be charged with the ſaid Rent, and the Declaration is, by which it might appear, that the Plaintiff ought to have the Rent, &c. ſo as the Declaration doth not agree in the whole. See 1 Ma. 143. in Browning and Beſtons Caſe, the Condition of the Leaſe was, if the Rent ſhould be arrear'd, not payd by two Months after the Feaſt, &c. and the Rejoynder was by the ſpace of two months, &c. And the pleading holden inſufficient, for per duos menſes doth not affirm directly poſt duos menſes, but by Implication and Argument: And here it was holden, that the Condition was a good conſideration. Another exception was taken, becauſe the promiſe is layed. All the Rent ad tunc debitum aut deinceps debend. It was holden, that this word (ad tunc) doth refer to the time of the ſhewing of the Deed, and not to the promiſe. And as to the laſt exception but one, it was reſolved, that the Declaration, notwithſtanding the ſame, was good enough (ſc.) oſtendit factum per quod apparet quod redditus prædict. ſolvi deberet in forma prædict. Another exception was taken, becauſe here no breach of the promiſe is alledged,

Suſpenſion of Rent.

ledged, for it is pleaded, that eight pounds de annuali reddita arrer. fuer. but it is not ſaid, de reddita prædict. 8 l. ergo it may be another Rent, and then the promiſe, as to this Rent, is not broken. Wray, Although the word (prædict.) be wanting, yet the Declaration is well enough, and it ſhall be intended the Rent mentioned before. See 21 H. 7. 30. b. Where (Villa Weſt.) ſhall be intended Villa prædict 19 E. 4. 1. In a Quare Impedit the Plaintiff doth entitle himſelf by grant of the next Avoidance cum acciderit, and doth not ſhew in his Count that the ſame was the next Avoydance, and yet the Count was holden to be good, for ſo it ſhall be intended: ſo here: And he ſayd, It is not neceſſary that a Declaration be exactly certain in every point, but if one part of it expound the other, it is well enough: And although the Identity of the Rent doth not appear by the word prædict. yet it appeareth by other circumſtances, as by the dayes of payment, &c. and no other Rent can be intended. And now, this Exception is after Verdict, and therefore favourably to be taken: And afterwards Judgment was given for the Plaintiff.

Hill. 31. *Eliz.* In the Kings Bench.

CCXLI. Musted *and* Hoppers *Caſe.*

Aſſumpſit.

IN an Action upon the Caſe, the Plaintiff declared, That where he and one Atkinſal, were joyntly and ſeverally bounden by Obligation in fifty pounds, to a ſtranger, for the only debt of the ſaid Atkinſal, which Atkinſal dyed, and the Defendant married afterwards his Wife, and ſo the Goods of Atkinſal came to his hands; yet the Plaintiff, the firſt day of May after, which was the day of payment of the money, paid five and twenty pounds for avoiding the Forfeiture of the penalty. The Defendant as well in conſideration of the Premiſſes, as in conſideration that he might peaceable enjoy the Goods of the Teſtator promiſed to pay the ſaid ſumm. cum inde requiſitus fuer. And upon Non aſſumpſit, the Jury found the payment of the ſaid ſumm, and all the precedent matter: And that the Defendant in conſideration præmiſſorum, promiſed to pay the ſayd ſumm if he might peaceably enjoy the Goods of the ſaid Teſtator. It was moved in arreſt of Judgment, that although here the Jury have found ſufficient cauſe of Action, yet if the Declaration be not accordingly, the Plaintiff ſhall not have Judgment. And here the Plaintiff hath declared upon two Conſiderations, and the Jury hath found but one, ſci. if he peaceable enjoy the Goods of the Teſtator. Alſo the Plaintiff declared of a ſimple promiſe, and the Jury have found a Conditionall, Si gaudere poteſt, &c. And ſo the promiſe ſet forth in the Declaration, is not found in the Verdict.

Verdict.

Gawdy was of opinion, That the firſt conſideration is good, for the Plaintiff entred into Bond at the requeſt of the Defendant, and then the promiſe following is good: But the ſecond conſideration is void, ſci. That the Defendant ſhall enjoy the goods of the Teſtator, &c. as if it had been that he ſhould enjoy his own goods, and all the Juſtices were clear of opinion, That the Promiſe found by the Jury is not the promiſe alledged in the Declaration, and ſo the iſſue is not found for the Plaintiff, and ſo the judgement was ſtayed.

Conſideration

Trinit.

Trinit. 30. *Eliz.* In the Kings Bench, *Rot.* 568.

CCXLII. Creckmere *and* Patterſons *Caſe.*

Deviſe conditionall.

UPon a ſpecial Verdict, the Caſe was this, Robert Dookin was ſeiſed of certain Lands in Fee, and, having iſſue two Daughters, deviſed the ſame to Alice his Eldeſt Daughter, that ſhe ſhould pay fourty pound to Ann. her ſiſter at ſuch a Day: the money is not paid, whereupon Anne entreth into the moiety of the Land: And it was holden by the whole Court, that the ſame is a good Condition, and that the Entry of Anne was lawfull. It hath been adjudged, That where a man deviſed his Land to his wife, Proviſo, My will is, That ſhe ſhall keep my houſe in good Reparations, that the ſame is a good Condition. Wray, A man deviſeth his Lands to B. paying 40 l. to C, it is a good condition; for C hath no other remedy, and a Will ought to be expounded according to the intent of the Deviſor.

Hili. 31. *Eliz.* in the Kings Bench:

CCXLIII. Dove *and* Williots *and others Caſe.*

IN an Ejectione firmæ, upon a ſpecial Verdict, the caſe was, That W was ſeiſed of the Land, where, &c. and held the ſame by Copy, &c. and ſurrendred the ſame unto the uſe of E. for life, the Remainder to Robert and A. in Fee, Robert made a Leaſe to the Defendant; E, Robert, and A. ſurrendred the ſaid Land, ſci. a third part to the uſe of Robert for the life of E. the Remainder to the Right heirs of Robert, and of another third part to the uſe of Robert for life, the Remainder to E, the Remainder to Richard, &c. and of another third part to the uſe of A and his Heirs. After which Partition was made betwixt them, and the Land where, &c. was allotted to Richard, who afterwards ſurrendred to the uſe of the Plaintiff. It was holden, That Judgement upon this verdict ought not to be given for the Plaintiff, For the Leſſee of Robert had the firſt poſſeſſion, and that Leaſe is to begin after the death of E, who was Tenant for life, and when E and he in the Reverſion joyn in a Surrender, thereby the eſtate for life in that third part is extinct in Robert, who hath the Inheritance, and then his Leaſe took effect for a third Part. So that the Parties here are Tenants in Common, betwixt whom Treſpaſſe doth not ly.

Hil. 31. *Eliz.* in the Kings Bench.

CCXLIV. Bulleyn *and* Graunts *Caſe.*

Copyhold.

Deviſe.

UPon Evidence to a Jury, the Caſe was, That Henry Bulleyn the Father, was ſeiſed of the Land being Copyhold, and had Iſſue three Sons, Gregory, Henry, and Thomas, and afterwards ſurrendered to the uſe of the laſt Will, and thereby deviſed the ſaid Land to Joan his Wife for life, the remainder to the ſaid Henry, and the Heirs of his body begotten: Joan dyed, after admittance, Henry dyed without Iſſue, and afterwards the Lord granted it to Thomas and his Heirs, who ſurrendered to the uſe of the Defendant then his Wife for life, and afterwards dyed without Iſſue: Gregory eldeſt Son of Henry Bulleyn entred, &c. Coke, When the Father ſurrendereth to the uſe of his laſt Will, thereby all paſſeth out of him, ſo as nothing accru-

eth

eth to the Heir, nor can he have and demand any thing before admittance. Wray, The entry of Gregory is lawfull, and admittance for him is not neceſſary, for if a Copyholder ſurrendereth to the uſe of one for life who is admitted, and dyeth, he in the Reverſion may enter without a new Admittance. It was moved by Coke, if this Eſtate limited to Henry be an Eſtate-tail, or a Fee conditionall. For if it be a Fee-ſimple conditionall, then there cannot be another Eſtate over: but yet in caſe of a Deviſe an Eſtate may depend upon a Fee-ſimple precedent, but not as a Will, but as an Executory Deviſe. Wray, It is not a conditionall Eſtate in Fee, but an Eſtate-tail. Coke, They who would prove the Cuſtome to entail Copyhold Land within a Manor, it is not ſufficient to ſhew Copies of Grants to perſons and the Heires of their bodies, but they ought to ſhew that ſurrenders made by ſuch perſons have been avoided by reaſon of ſuch matter. Wray, That is not ſo, for Cuſtomary Lands may be granted in tail, and yet no ſurrenders have been made within time of memory. Copyhold Eſtate.

Mich. 31 *Eliz.* In the Kings Bench

Matthew *and* Haſſalls Caſe.

IN an Ejectione firmæ, betwixt Matthew and Haſſall, the Plaintiff had Judgment to recover, and the Defendant brought a Writ of Error, and aſſigned Error in this, that the Judgment was entred, Quod querens recaperet poſſeſſionem, &c. where it ſhould be (Terminum) vent. in ten. prædict. See 9 Eliz. Dyer 258. Coke contrary, That the Judgment is good enough, for the Writ of Execution upon it is Habere facias poſſeſſionem, and in a reall Action the Writ is, Quod petens recuperet ſeſinam, and not terram. And afterwards Judgment was affirmed. Error.

Hil. 31 *Eliz.* in the Kings Bench.

CCXLVI. Tempeſt *and* Mallets Caſe.

IN an Action of Treſpaſs by Tempeſt againſt Mallet, Judgment was given, and Error brought: and aſſigned for Error; that whereas the Action was brought againſt foure, one of them dyed, Meſne betwixt the Award of the Niſi prius, and the Inqueſt taken: And it was ſaid on the part of the Defendant in the Writ of Error which was entred upon the Record, that the Plaintiff ſhewed unto the Court the death of one of the Defendants, and prayed Judgment againſt the others. See 4 H. 7. 2 Eliz 175. And there is a difference, where in an Action of Treſpaſs there is but one Defendant, and where many. Another Error was aſſigned, the Defendant Obtulit ſe per Higgins Attornat. ſuum, without ſhewing his Chriſtian Name, as John, or William, for Higgins onely without the Chriſtian Name, is not any Name, for it is but an addition to ſhew, which John, or William. Coke, The ſame is helped by the Statute of 42 H 8 cap. 30. Where it is enacted, that after Verdict, Judgment ſhall be given notwithſtanding the lack of Warrant of Attorney of the part againſt whom the Iſſue ſhall be tryed, or any default or negligence of any the parties, their Counſellors or Attorneys; and of neceſſity this default here in the Chriſtian Name ought to be the fault of one of them. See alſo 18 Eliz. Cap. 14. for want of any Warrant of Attorney, &c. Glanvil, The Statute provides for default of Warrant of Attorney, &c. Then (Coke) To what end was the Statute of 18 Eliz. made? for the Statute of 32 H. 8. provides for defects of Warrants of Attorney. Glanvill, The firſt Statute provides for Warrants of Attorneyss of ſuch perſons againſt whom

whom the Iſſue was tryed, but the later Statue is generall. Another Error was aſſigned, Quod defendens Capiatur, where the Offence, & ſo the Fine is pardoned by Parliament, and therefore the entry of the Judgment ought to be, Et de fine nihil, quia perdonatur. Coke, The Judgment is well enough, for in every generall Pardon ſome perſons are excepted; & it doth not appear if the Defendant here were one of them, and then the Fine is not pardoned, for the Court cannot take notice of that, as it was holden in Serjeant Harris Caſe: but if the Defendant be charged with the Fine, then he ought to plead the pardon, and to ſhew that he was not any of the perſons excepted. And afterwards at another day the Defendant did alledge, that there was a Warrant of Attorney in the Common Pleas. And alſo it appeareth upon Record, that the Defendant did appeare upon the Superſedeas by Attorney, who had his full Name, and therefore prayed a Certiorare de novo, to certifie the ſame matter, vide 9 E.4. 32. Wray, A Caſe here greatly debated betwixt the Lord Norris and Braybrook, and upon a Deviſe ſuch a Writ of Error was granted after the Plaintiff had pleaded In nullo eſt erratum; for this Plea, in nullo eſt erratum, goes but to that which is contained within the body of the Record, and not unto collaterall matter, ſcil. Warrant of Attorneys: And afterwards the Writ of Error was allowed, and upon the day of return thereof, it appeared upon the Record of *Superſedeas*, that the Defendant did appeare by ſuch a one his Attorney: But it was ſaid by the Court, that there ought to be two appearances, the one upon the Superſedeas, and the other when the Plaintiff declares, See as to the name of the Attorney, Tirrells Caſe, 1 Mar. Dyer 93.

In nullo eſt erratum.

Hil. 31 *Eliz.* in the Kings Bench.

CCXLVII. Palmer *and* Knowllis *Caſe.*

PAlmer recovered Debt againſt Knowllis, and ſued Execution by Elegit, upon which the Sheriff returned, that he had made partition of the lands of the Defendant by the Oath of twelve men, but he could not deliver it to the party, for it is extended to another upon a Statute, upon which the Plaintiff ſued a Capias ad ſatisfaciendum. And now came the Defendant by his Counſell, and moved that after Elegit returned, the Plaintiff could not reſort to the Execution by Capias, and therefore prayed a *Superſedeas*; becauſe the Capias erronice emanivit. But the whole Court was clear to the contrary; for upon Nihil returned upon Elegit, the Plaintiff ſhall have a Capias, 17 E. 4,5. See 21 H. 7. 19. A man ſhall have a Capias after a Fieri facias, or Elegit, 34 H.6.20. and here the ſpeciall return doth amount to as much, as if the Sheriff had returned Nihil: alſo the Statute of Weſt.2. which giveth the Elegit, is not in the Negative, and therefore it ſhall not take away the Execution which was at the Common Law. And here is no Execution returned, for after the former extent ended, he ought to have a new Elegit; which Wray granted: and afterwards the ſaid Knowllis was taken by force of the Capias ad ſatisfaciend. and came into Court in the Cuſtody of the Sheriff, and the Caſe was opened, and in the whole appeared to be worthy of favour; but by the Law he could not be helped, and although he inſtantly prayed a *Superſedeas*, yet the ſame was denied unto him.

Execution.

Capias after Elegit.

Hil.

Hill. 31. *Eliz.* In the Common Pleas.

CCXLVIII. *The Church-wardens of* Fetherſtones *Caſe.*

AN Action of Treſpaſs was brought by the Churchwardens of Fetherſtone in the County of Norfolk, and declared That the Defendant took out of the ſaid Church a Bell, and declared, That the Treſpaſs was done 20 Eliz. And it was found for the Plaintiffs. And now it was moved by Godfrey in arreſt of Judgement, That it is apparent upon the Declaration, That the Treſpaſs was done in the time of their Predeceſſors, of which the Succeſſor cannot have action: and actio perſonalis moritur cum perſona. See 19 H. 6. 66. But the old Churchwardens ſhall have the action. Cook contrary, and that the preſent Churchwardens ſhall have the action, and that in reſpect of their office, which the Court granted. And by Gawdy Churchwardens are a Corporation by the Common Law. See 12 H. 7. 28. by Frowick That the New Churchwardens ſhall not have an action upon ſuch a Treſpaſs done to their Predeceſſors, contrary by Yaxley. See by Newton and Paſton, That the Executors of the Guardian in whoſe time the Treſpaſs was done ſhall have Treſpaſs. Church-wardens.

Paſch 31. *Eliz.* In the Kings Bench.

CCXLIX. Hauxwood *and* Husbands *Caſe.*

IN an action upon the Caſe, the Plaintiff declared for diſturbing of him to uſe his common, &c. and ſhewed, That A. was ſeiſed of certain lands, to which this Common was appendant, for the term of his Life, the Remainder to B in tail, and that the ſaid A and B did demiſe unto him the ſaid Lands for years, &c. Pepper, The Declaration is not good, for it is not ſhewed how theſe particular eſtates did commence. See 20 E. 4. 10. By Pigot, ſecondly, Leſſee for life cannot preſcribe, and he, and he in the Remainder, cannot preſcribe together; and he in the Remainder cannot have common: Alſo he declares, That Tenant for life, and he in the Remainder demiſed to him, whereas in truth it is the demiſe of Tenant for life, and the Confirmation of him in the Remainder; alſo he doth not aver the life of Tenant for life. Popham, Ye needs not to ſhew the commencement of the particular eſtates, for we are a ſtranger to them, the Preſcription in them both is well enough, for all is but one eſtate, and the Leaſe of both. See 27 H. 8. 13. The Leſſee for life, and he in the Reverſion made a leaſe for life, and joyned in an action of waſt, and there needs no averment of the life of the Tenant for life, for he in the Reverſion hath joined; which Gawdy granted as to all. And ſaid, The particular eſtates are but as conveyance unto the action. Wray conceived the firſt Exception to be material, &c. Preſcription.

Trin 31. *Eliz.* In the Kings Bench.

CCL. Sweeper *and* Randals *Caſe, Rot.* 770.

IN an action of Treſpaſs for breaking of his Cloſe, and carrying away of his goods, by Sweeper againſt Randall, upon Not guilty pleaded, The Jury found, That one John Gilbert was ſeiſed of the Land, where, &c. and leaſed the ſame to the Plaintiff at Will. who ſowed the Land, and afterwards the Plaintiff agreed with the ſaid Gilbert, to ſurrender to him the ſaid

Land, and his interest in the same; and the said Gilbert entred, and leased to the Defendant, who took the Corn. It was moved, If these words, I agree to surrender my Lands, be a present and expresse surrender. Gawdy, It is not any surrender, for Tenant at will cannot surrender, but it is but a relinquishing of the estate, if it be any thing, but in truth it is not any thing in present, but an act to be done in future. Wray, I agree. A demiseth the Manor of D at will, it is no Lease, no more shall it be here any Surrender, or any relinquishing of the estate. Clench conceived, That the intent of the Partie was, to leave his estate at the time of the speaking, otherwise those words were void, for he might leave it at any time without those words Gawdy, If such was his intent, the Jury ought to finde it expressly; and afterwards Judgement was given for the Plaintiff.

Surrender.

Trin. 31. *Eliz.* in the Kings Bench.

CCLI. Ward *and* Blunts *Case.*

Trover and Conversion.

IN an Action upon the Case of Trover of certain Loads of Corn at Henden in Middlesex, and the conversion of them; The Defendant pleaded, That before the conversion, he was seised of certain Lands called Harminglow in the County of Stafford, and that the Corn whereof, &c. was there growing, and that he did sever it, by force of which he was possessed, and the same casually lost; and that the same came to the hands of the Plaintiff, and the Plaintiff casually lost the same, and the same came to the hands of the Defendant at Henden, aforesaid, and he did convert the same to his own use, as it was lawfull for him to de: upon which the Plaintiff did demur in Law. Atkinson, The Plea is good, for the conversion is the point of the action, and the effect of it. For if a man take the same, and do not convert, he is not guilty. And here the Defendant doth justifie the conversion, wherefore, he cannot plead, Not guilty. The generall issue is to be taken where a man hath not any colour, but here the Defendant hath colour, because the corn whereof, &c. was growing upon his Land; which might enveigle the lay people, and therefore it is safest, to plead the special matter. But admit, that it doth amount but to the generall issue; yet there is not any cause of Demurrer, but the Plaintiff ought to shew the same to the Court and pray, that the generall issue be entred; and the Court ex officio ought, to do it. Egerton, the Queens Solicitor, contrary. The Plea in Bar is not good, The Plaintiff declares of a Trover of his goods, ut de bonis suis propriis, and the Defendant pleads, That he took his own goods, which is not any answer to the Plaintiff. See 22 E 3. 18. In trespass of taking and carrying away of his Trees, The Defendant pleads, That they were our Trees, growing in our own soil, and we cut them and carried them away, and the plea was challenged, wherfore the Defendant pleaded over, without that that he took the Trees of the Plaintiff. So 26 Ass. 22. and 30 E 3. 22. Another matter was, The Plea in Bar is, That before the time of the Conversion, The Defendant was seised of the Land, and sowed it; and that after the Corn was severed, (but he doth not say that he was seised at the time of the severance) and then it might be that he had severed the corn of the Plaintiff, &c. and that was holden by the Court to be a material exception, wherefore Judgement was given for the Plaintiff: But as to the first Exception; the same was disallowed, For the Court ex Officio, in such case ought to cause, the general issue to be entred, but the Plaintiff ought not to demur upon it.

Trin.

Trin. 31. *Eliz.* In the Kings Bench.

CCLIV. Cheiny *and* Langleys *Case*, *Hill.* 31. *Eliz. Rott.* 638.

THe caſe was, That Tenant for life of certain Lands leaſed the ſame for years by Indenture, with theſe words; I give, grant, bargain, and ſell my intereſt in ſuch Lands for twenty years, To have and to hold, in ſuch manner; and form as I my ſelf did hold the ſame, and no otherwiſe, Tenant for life dyed within the Term; and he in the Reverſion entred, and the Leſſee brought an action of Covenant. Godfrey, The action doth not ly, for here is not any warranty, for the Plaintiff is not Leſſee, but Aſſignee, to whom this Warranty in Law cannot extend; but admit that the warranty doth extend to the Plaintiff, yet it is now determined with the eſtate of the Tenant for life, and ſo the Covenant ended with the eſtate. See 32 H. 6. 32. by Littleton 9. Eliz. Dyer 257. And if Tenant in tail make a Leaſe for years (ut ſupra) and afterwards dieth without iſſue, the covenant is gone; and after Judgement was given againſt the Plaintiff.

Leaſes.

Covenant.

Trin. 31. *Eliz.* in the Kings Bench.

CCLV. *Fiſh, Brownes*, and *Sadlers* Caſe, *Intrat. Mich.* 29. *Eliz. Rot.* 606.

AN action upon the Caſe was brought by Fiſh and Brown againſt Sadler, Hill. 29. Eliz. rot. 606. and they declared, That they were proprietaries of certain goods, which were in the poſſeſſion of one A againſt which A Sadler one of the Defendants had commenced a feigned and covenous ſuit in the Eccleſiaſtical Court in the Name of one Colliſon, to the intent to get the ſaid goods into his poſſeſſion, of which the Plaintiffs having notice, and to the intent that the ſaid Plaintiffs ſhould ſuffer the Defendant to recover and obtain the ſaid goods by the ſaid ſuit, the Defendant did promiſe to the Plaintiffs to render to them a true accompt of the ſaid goods; and ſhewed further, That by the ſaid ſuit the Defendant did obtain the ſaid goods by ſufferance of the Plaintiff. Tanfeild, It is a good conſideration, the Plaintiffs were not parties or Privies at the beginning of the ſuit, and it is not like Onlies caſe in 19. Eliz. Dyer 355. Where in an action upon the Caſe Onlie declared, That the Defendant Counteſſe, &c. being a Widow, had divers ſuits and buſineſſes, and that the Plaintiff at her requeſt had beſtowed great labour and travail, and had expended circa the affairs of the ſaid Counteſſ 1500 l. Whereupon ſhe promiſed to the Plaintiff to pay all the ſaid expences, and ſuch a ſum above for that matter, which is the ground of the action, is maintenance, and malum prohibitum, but ſuch matter is not here; for it is lawful for a man to uſe means to get his goods. Gawdy, All covins are abhorred in Law, and here the Plaintiffs are privies to the wrong, and therfore, it cannot be any conſideration. Wray, Although that the ſuit at the beginning was wrongfull and covenous, yet when the Plaintiffs who were owners of the ſaid goods do aſſent to ſuch proceedings now the ſuit is become juſt and lawful ab initio, and ſo no wrong in the conſideration, but all the wrong is purged by the agreement. If any covin be, the ſame is between Sadler and him who is ſued, to whom the Plaintiffs are not privies. Clench, If this privity betwixt the Plaintiffs and Sadler had been before the ſaid ſuit; ſo the conſideration is without any fraud. Cooper Serjeant conceived here is not any good conſideration, upon which the Promiſe of the

Action upon the Caſe.

Aſſumpſit and conſideration.

Covin.

Defendant may be grounded, for the Defendant hath not any benefit by it, and he cited the case between Smith and Smith 25 Eliz. Egerton, Here the consideration is good enough, for the plaintiffs forbear their own suit which was a hinderance unto them. Clench was of opinion, that the Plaintiff should not have Judgement, for that suit was begun by Sadler in the Name of Collison without his privity, and therefore it was unlawfull, and the same was for the goods of another man, which is unlawfull also, and then when the unlawfull act is begun, the illegall agreement afterwards that they shall proceed is unlawful also, and therefore there cannot be any consideration: and as to the covin, it is not material, for without that, the matter is illegal enough. Also the Declaration is not good in this, because it is not shewed in what Court the suit did depend, so as it might appear unto us, that they had power to hold plea of it; Gawdy agreed with Clench in the first point, and also in the last, and by him, in the assumpsit, the Plaintiff declares, that a suit was depending betwixt the Defendant and another, and where the Plaintiffs if they were produced might have given strong witnesse against the Defendant, the said Defendant in consideration that the Plaintiffs would not give Testimony against him, promised to give to the Plaintiff 20l. the same consideration will not maintain this action; because it is unlawful for any man to suppress testimony in any cause. Wray, Here is a consideration good enough, For where Sadler should loose costs upon the first suit, now upon this promise upon his account he shall be allowed the same, the which is a benefit unto him: and as to the shewing in what Court the suit doth depend, that needs not by way of Declaration, but the same shall be shewed by way of Evidence, and it is not traversable, and it is but inducement to the action. And as to the covin, that is not here, for covin is alwaies to the prejudice of a third person, but so it is not here: But in truth this suit was unlawfull, for Sadler so to sue in the Name of another, and therefore it cannot be a good consideration. And for that cause, it was awarded, Quod querens nihil capiat per billam.

Trin. 31. *Eliz.* in the Kings Bench.

CCLIV. Howe *and* Connyes *Case.*

Trespass. IN an action of Trespass by Howe against Conney, the case was, That one Smith was seised of two houses, and leased one of them to his brother for life, and afterwards by his Will devised, viz. I give to my Executors, All my Lands and Tenements free and coppy, to hold to them, and they to take the profits of them for ten years, and afterwards to sell the said Lands and Tenements; and afterwards dyed, his brother dyed before the quarter of a year after: and it was found, That the Executors entred into the house undemised, and took the profits, but not into the other, and that at the end of the said ten years, they sold the whole. Godfrey, The house only which was in possession, shall passe by the will. (To hold unto them) doth imply matter of possession,, so as nothing passeth but that whereof they may take the profits, the which cannot be of a bare Reversion, also by this devise, the Executors have not interest in the thing devised but for ten years, whereas the brother of the Testator had an estate for life, which by possibility might continue above twenty years, and to prove that the meaning of the devisor to be collected upon the words of the Will ought to direct the construction of the Will, he cited Chicks case, 19 Eliz. 357. and 23 Eliz. 371. Dyer. At another day it was argued by Cook, That both the Houses passe, and the words (take the profit) do not restrain the general words before, (viz. All my Lands and Tenements) but rather expounds them, sci. such profits that they might take

Devise.

take of a Reverſion, cum acciderit, for it may be that the brother ſhall dye within the ten years. And he cited the caſe 34 H. 6. 6. A man ſeiſed of diverſe Reverſions upon eſtates for life, deviſe them by the name of omnium terrarum & tenementorum, which were in his own hands, and by thoſe perols, the Reverſion did paſs, and yet the Reverſion (to ſpeak properly was not in his hands: and if the brother had dyed in the life of the deviſor, they had clearly paſſed, and then his death or life ſhall not alter the caſe. And he reſembled the caſe to the caſe in 39 E. 3. 21. The King grants to the Abbot of Redding, That in time of vacation the Prior and Monks ſhall have the diſpoſition of all the poſſeſſions of the ſaid Abbey ad ſuſtentationem Prioris & Monachorum, and if in the time of vacation they ſhall have the Advowſons, was the queſtion, for it was ſaid, That advowſons could not be to their ſuſtentation, but yet by the better opinion the grant of the King did extend to Advowſons, for it ſhall be intended ſuch ſuſtentation as Advowſons might give. Godfrey, Our Caſe is not like to the caſe of 34 H. 6. for there the Deviſor had not any thing in poſſeſſion, & therfore if the Reverſion did not paſſe, the deviſe ſhould be utterly void. Gawdy conceived that the houſe in poſſeſſion only paſſed, for the deviſe extends to ſuch things only, whereof the Profits might be taken, but here is not any profit of a Reverſion. Clench, and Wray contrary, The intent of the deviſe was to perform the Will of his Father, and alſo of his own Will, and in caſe, the houſe in poſſeſſion was not ſufficient to perform both the Wills all ſhall paſſe, and therfore the deviſe by favorable conſtruction is to be taken largely, ſo as the wills might be throughly performed, and alſo the deviſe is general, and further all his Lands and tenements, which are not reſtrained by the Subſequent words (to take the profits) for to have and to hold, and to have and to take the profits is all one.

Trin. 31 *Elix.* In the Kings Bench.

CCLV. Slugge, *and the Biſhop of* Landaffs *Caſe.*

Slugge libelled againſt the Biſhop of Landaff in the Eccleſiaſtical Court, becauſe where he was preſented by the Dean and Chapter of Glouceſter to the Church of Penner, the Biſhop did refuſe to admit him, and now the Biſhop ſued a Prohibition, and ſhewed, Quod non habetur talis Rectoria cum cura animarum in eadem dioceſi, ſed perpetua vicaria. And by Popham a Prohibition doth not lye, but the matter ought to be determined in the Eccleſiaſticall Court, and when he who is preſented to the ſame Church, whether it be a Church or not, ſhall be tryed in an action of treſpaſs, and the like matter was ruled, Mich. 14. Eliz. betwixt Weſton and Grendon, who was preſented by the Queen, and it was holden, that becauſe inſtitution and admiſſion do belong to the Eccleſiaſtical Court, and not to the Kings Court, that no Prohibition ſhould lye, and therefore he prayed a conſultation. And note, That the Defendant in the Prohibition did not demur formally upon the ſuggeſtion for the Judges uſe, if the ſuggeſtion be not ſufficient to maintain the Prohibition, to grant a conſultation without any formall demurrer upon the ſuggeſtion, if the inſufficiency of the Suggeſtion be manifeſt, which was granted by the whole Court. Cook, That a Conſultation ought not to be granted, for whether there be ſuch a Rectory or not ſhall be tryed here. So 2 H. 4. 30. Prior or not Prior, 49 E. 3. 17, 18. Wife, or not Wife, but never accoupled in loyal matrimony by the Biſhop, 44 E. 3. So within or without the Pariſh, 50 E. 3. 20. So, 45 E. 3. Quare Impedit, 138. In a Quare Impedit, no ſuch Church within the County. Afterwards, at another day, Popham put the caſe, Slugge was preſented to the vicaridge of Penner, the Biſhop refuſed to admit him, and admitted one Morgan Bletthen unto the Parſonage of

Prohibition.

Tryal.

of Penner, at the preſentment of the Lord St. John; Slugge ſued the Biſhop for contumacy, per duplicem querelam, The Biſhop ſaid, Non habetur talis vicaria, upon which matter he ſued a Prohibition, and he conceived, That the Prohibition did not lie, for a Vicar is but he, that gerit vicem Perſonæ, to ſupply his place in his abſence, ſo as the ſame is a ſpiritual matter which ought not to be tryed here, alſo the libel is, to have admiſſion and juſtificati-on, and the other matter ariſeth by their Plea, ſci. Quod Rectoria de Pen-ner eſt Eccleſia cum cura animaram, abſque hoc quod habetur talis Vicaria, and ſo it is but an incident to the principal matter, wherefore it ſhall be tryed there, and he prayed a Conſultation. Cook, We have ſhewed, That in the time of E. 3. one L was ſeiſed of the Mannour of Penner, to which the Church of Penner is appendant; and we alledge preſentments from that time, and we convey it to the Lord St. John, which now is, and they would now defeat us by this ſurmiſe, That there is no ſuch Church with cure of Souls, which is tryable here. Popham the libel doth contain nothing but contumacy in the Biſhop, in that he hath not admitted Slugge, and the other matter comes in the Replication, and afterwards by aſſent of the parties a Conſultation was granted, quoad inſtitutionem of Slugge only, but that they ſhould not proceed further.

Paſch. 31. *Eliz. Rot.* 154 In the Kings Bench.

CCLVI. Fennick *and* Mitfords *Caſe.*

THe Caſe was, A man ſeiſed of Lands in Fee, levieth a Fine to the uſe of his wife for life, the remainder to the uſe of his eldeſt ſon, and the heirs males of his body, the Remainder to the uſe of the right heirs of the Conuſor, The Conuſor makes Leaſe for a thouſand years to B. the eldeſt Son dyeth without iſſue male, having iſſue a daughter, the Conuſor dyeth, the wife afterwards dyeth, the eldeſt ſon enters and leaſeth the Lands to the Plaintiff. Atkinſon, That upon this conveyance a Reverſion, was left in the Conuſor, although by the fine all is conveyed out of the Conuſor; and ſo (as it hath been objected) the uſe limitted to the right heirs of the Conuſor, is a new thing: For it is to be obſerved, When a man is ſeiſed of Lands, he hath two things, the Land, or the Eſtate, and ſecondly the uſe which is the profits, and if he make a Feoffment without conſideration, by that the eſtate and poſſeſſion paſſeth, but not the uſe, wherefore the uſe deſcends af-ter to the Son and Heir. And in our caſe if the wife and Son had died with-out iſſue in the life of the Father, all ſhould be in the Father and his heirs. And if a man make a Feoffment in Fee, unto the uſe of his laſt Will, it ſhall be unto the uſe of the Feoffor, and his Heirs, and in our caſe, this li-mitation to the Right Heirs of the Conuſor is, as if no mention had been made of it, and then it ſhould be to the Father, and his heirs. And afterwards it was adjudged, That it was a Reverſion, and no Remainder, and by Gawdy, This Limitation, To his Right Heirs, is meerly void, Wray, As if he had made a Feoffment to the uſe of one for life, without fur-ther Limitation.

Hill.

Hill. 31. *Eliz. Rot.* 723. in the Kings Bench:

CCLVII. Holland *and* Franklins *Case.*

IN a Replevin, the Defendant made Conusans as Bayliff to Thomas Lord Howard, and shewed, How that the Prioress of Holliwel was seised of the Mannour of Prior in her demeasn as of Fee, &c. and 4 Nov. 19. H. 8. by Deed enrolled sold unto the Lord Audley, the said Mannour, who dyed, having issue a Daughter, who took to Husband, Thomas late Duke of Norfolk, who had issue the said Lord Howard, and that after their death the said Mannour descended, &c. The Plaintiff in bar of the conusans shewed, That the said Deed was primo deliberatum, 4 Nov. 30 H. 8. And that mean betwixt the date and the delivery, sci. 12. October, The said Prioress leased the said Mannour to one A. for ninety nine years, and conveyed the Term to the Plaintiff, absque hoc, that the Prioress bargained and sold the said Mannour to the Lord Audley, ante dimissionem prædict. dicto A. fact. upon which there was a Demurrer. Cook, This Averment of another delivery then the Deed doth purport against the Deed enrolled, shall not be received, no more then a Man may aver, That a Recognizance was acknowledged at another day, &c. for every Record imports a truth in it, and expresse averment shall not be received against it, but a man may confess and avoid; See 7 H. 7. 4. It cannot be assigned for error, that in a Rediseisin, the Sheriff non accessit ad tenementa, as he hath returned for that is against his Return which is Recorded, and the date of the Record is the principal part of it, which see 37 H 6. 21. by all the Justices, That matter of Record hath alwaies relation to the date, and not to the Delivery, contrary of a Deed which is not of Record, for the same shall have relation alwaies to the delivery, and See 39 H 6. 32. by all the Justices averment against a deed enroled that it was not delivered shall not be received, so in the Case betwixt Ludford and Gretton, 19 Eliz. Plow. 149. It is holden by all the Justices, That the Kings Charter hath relation to the time of the date, because that matters of Record carry in them by presumption of Law for the Highness of them, truth, and therefore one cannot say, That such a Charter was made or delivered at another day, then at that at which it bears date, So of a Recognizance, Statute, &c. but against Letters Pattents a man may say, Non concessit, for perhaps nothing passeth thereby, and then it is not contrary to the Record. Atkinson contrary, I confess that the party himself (whose deed it was) cannot take a direct averment against a deed enrolled, but he may confess and avoid it, so as he leave it a Record, as if a Fine be leavied by another in my name of my Land, I am bound by it, but if the Fine were levyed by another in my name I am not bound, for I may confess and avoid it, and yet leave the Record good, but here the Plaintiff is a stranger to his deed enrolled: And some Records shall bind all persons, as certificates of Bastardy, &c. for all may give evidence in such case, 2 H. 5. Estoppel 91. A makes a Feoffment in Fee and afterwards before the Coroner confesseth a Felony supposed to be done before the Feoffment, the Feoffee shall have an averment against it. Egerton the Queens Solicitor, contrary, Matter of Record cannot be gainsaid in the point, or in matter of implication, and therefore against that he cannot say, Non est factum, 16 E 3. Abb. 13. A deed inrolled in pais, cannot be denyed, 24 E 3. 64. A Deed inrolled is not a Record, but a thing recorded, which cannot be denyed. And here this plea is a violent averment against the deed for it amounts to as much as if he had said, Not his deed at the time of the Enrollment: But I confess that such a deed may be avoided, by a thing which stands with the deed by matter, out of the deed. It hath been objected,

Replevin.

Averment

Relation of Records and Deeds.

Averment.

That

That this acknowledging of the deed ought to be made by Attorney, and therefore made in person it is not any acknowledgement, and so against such acknowledgement, Non est factum may be pleaded, and a Fine or confession in a Writ of annuity upon prescription, or in assise shall binde the house, See 16 E. 3. Abb. 13. That a fine, Recognizance, and Covenant of Record shall binde the House in such case. And the acknowledgement of the Prioresse alone will serve in this Case, for the Nuns are as dead persons, And posito, that a Master of the Chancery comes into the chapter-house, and receives such an acknowledgement, I conceive that it is good enough: It hath been objected, That here the Plaintiff is not estopped to take the averment, because we have not pleaded our matter by way of Estoppel: certainly the same needs not here, for the Record it self carries the Estoppell with it, and the truth appeareth by the Record, and the Court ought to take hold of it. Godfrey contrary, A deed enrolled may be avoided by matter, which is not contrary to the Record, as 19 R. 2 Estoppel 281. in sur cui in vita, a Release of the Mother of the Demandant with warranty was pleaded in bar, and that enrolled, To which the Demandant said, That at the time of the Release supposed to be made; our mother had a husband, one F, and so the Deed was void, and so avoided the deed by matter Dehors, sci. Coverture, so of enfancy, but not by a generall averment: A man not lettered shall avoid a deed enrolled by such special matter, so, an obligation made against the Statute of 23 H. 6. and these special matters shall utterly avoid the deeds against whom they are pleaded, but in our case we do confess the deed to be good to some intent, sci. after our Lease expired, for which our case is the better case. And at another day it was objected, That the deed could not be acknowledged without a Letter of Attorney, being a Corporation, which consisted upon divers persons as Prioress and covent, and they are alwaies to be intended to be in their chapter-house, and cannot come into Court to acknowledge a Deed To which it was answered by Cook, That this acknowledgement being generally pleaded, it shall be intended, that it was done by a Lawfull means, and there is no doubt, but that such a Corporation may levy a Fine, and make a Letter of Attorney to acknowledge it, and see, 2 Ma. Fulmerstons case 105. It was further objected, That this Deed was enrolled the same day that it beareth date, for the pleading is per factum suum gerens Datum, 2 Novemb. 29 Hen. 8. et iisdem die & anno irrotulat. And by the Statute such a deed ought to be enrolled within six moneths next after the date, so as the day of the date is excluded, and so it is not enrolled within the six months: as to that it was answered by Cook, That the time of computation doth begin presently after the delivery of the deed, as in the common Cases of Leases, If a man makes a Lease for years to begin from the day of the date, the same is exclusive, but if it be To have and to hold from the date of the deed, it shall begin presently. And an Ejectment supposed the same day is good, and then here; this Enrolment is within the six Moneths; and yet see 5 Eliz. 128 Dyer Pophams case. It was also objected, That it is alledged in the conusans, That the Mannour was sold to the Lord Audley, and that the Deed of Bargain and Sale was acknowledged and enrolled in the Chancery, the said Lord being then Lord Chancelor, and he cannot take an acknowledgement of a Deed, or enrolment of it to himself, for he is the Sole Judge in the said Court, so as the deed is acknowledged before himself, and enrolled before himself, and that is good enough, for here we are not upon the common Law, but upon the Statute, and here the words of the Statute are performed. And the enrolment of the Deed is not the substance of the Deed, but the deed it self. Also the acknowledgement of the Deed, after it is enrolled is not material for he is estopped to say that it is not acknowledged. And as to the matter it self, a man shall not have averment against

the

the purport of a Record, but against the operation of a Record, as not put in view, not compriſed, partes ad finem nihil haberunt, &c. And againſt Letters Pattents of the King, Non conceſſit, is a good plea, which ſee 18. Eliz. for by ſuch plea it is agreed, that it is a Record, but that nihil operatur.

Mich. 31. *Eliz.* in the Kings Bench. *Rot.* 258.

CCLVIII. Osborn *and* Kirtons *Caſe*.

IN Debt upon an Obligation, The Defendant caſt a Protection, upon which the Plaintiff did demur. Tanfield, The Protection is not good, for the Defendant is let to Bail, and ſo is intended alwaies in priſon, for ſo the Record makes mention, and then the Protection quia moratur in portibus, Zeland is againſt the Record, and the Court ought to give credit to Records eſpecialy, ſecondly the words of the Protection are, That Kirton is imployed in Obſequio noſtro, which is no cauſe of protection, for the uſual form (and ſo is the Law) that ſuch a perſon be imployed in negotio Regni, for the defence of England, &c. For if the King will give aid unto another Princes Subjects employed in ſuch ſervice, he ſhall not have Protection. And afterwards variance was objected betwixt the Will and Declaration, and the Protection; for the Will is againſt Iohn Kirton of A Gentleman, and the Protection is Iohn Kirton onely: But the ſame was holden no ſuch variance being onely in the Addition, for before the Statute 1 H 5. additions were not neceſſary in any actions. Debt. Protection.

Hil. 30 *Eliz.* *Rot.* 156. in the Kings Bench.

CCLIX. Bopton *and* Andrews *Caſe*.

IN Debt upon an Obligation, the Condition was, to make ſufficient aſſurance of certain Lands to the Obligee before the tenth day of March 17 Eliz. And if it fortune the ſaid Obligee be unwilling to receive, or miſlike ſuch aſſurance, but ſhall make Requeſt to have one hundred pounds for ſatisfaction thereof. Then if upon ſuch Requeſt, the Obligor pay one hundred pounds within five moneths, That then the Obligation ſhall be void. And at the day, the Obligee doth refuſe the aſſurance, and afterwards 27 Eliz. requeſt is made to have the hundred pounds, It was the clear opinion of the whole Court, That the ſaid Requeſt was well enough for the time, and he might make it at any time during his life, and he is not reſtrained to make it before the day in which the Aſſurance is to be made, and afterwards judgment was given for the Plaintiff. Debt.

Mich. 29. & 30. *Eliz.* *Rot.* 546. In the Kings Bench.

CCLX. Knight *and* Savages *Caſe*.

IN a Writ of Error was brought upon a Judgement given in Leiceſter in Debt, Tanfeild aſſigned error, becauſe in that Suit there was not any plaint, and in all inferior Courts, the plaint is as the original at the common Law, and without that no proceſſe can iſſue forth. And hereupon the Record nothing is entred but that the Defendant ſomonitus fuit, &c. and therefore the firſt entry ought to be A. B. queritur adverſus, C. &c. Error.

Clench, A Plaint ought to be entred before process issueth, and the summons which is entred here, is not any plaint, and for that cause the Judgement was reversed: It was said, That after the Defendant appeared, a Plaint was entred, but it was said by the Court, That that shall not mend the matter, for there ought to be a plaint out of which the process shall issue, as in the Courts above out of the original Writs.

Trin. 31 *Eliz.* In the Kings Bench.

CCLXI. Kirby *and* Eccles *Case*.

IN an action upon the Case the Plaintiff declared, Quod cum quædam communicatio fuisset betwixt the Plaintiff, and one Cowper, That Cowper, should mast certain Hogs for the Plaintiff, the Defendant did promise, That in consideration, that the Plaintiff should give unto the Defendant three shillings and four pence, for the fatting of every Hog, That the said Hogs should be redelivered to him well fatted; to which promise and warranty, the Plaintiff giving faith, delivered to the said Cowper one hundred and fifty Hogs to be masted; and that one hundred of them were delivered back, but the residue were not: It was moved, That here is not any consideration for which the Defendant should be charged with any promise: but it was argued, on the other side, That the Promise was the cause of the Contract, and being made at the time of the Communication and contract, should charge the Defendant, but if the promise were at another time, it should be otherwise, There was a Case lately betwixt Smith and Edmunds, Two Merchants, being reciprocallie endebted the one to the other, agreed betwixt themselves to deliver all their Bills and Bonds into the hands of one Smith, who promised that he would not deliver them to the parties until all accounts were ended betwixt them; and yet he did deliver them, and for that an action brought against him was adjudged maintainable: yet there was not any consideration, nor was it material, for the action is grounded upon the Deceit, and so is it here, upon the Warranty: and of that opinion were Clench and Wray, Justices, but Gawdy was of a contrary opinion.

Hill. 30 *Eliz. Rot.* 6,9 In the Kings Bench.

CCLXII. Woodshaw *and* Fulmerstones Case.

WOodshaw, Executor of Heywood, brought Debt upon a Bond against Richard Fulmerstone, and the Writ was dated October Mich. 29. & 30. Eliz. and the Condition of the Bond was, That if Fulmerstone dyed before his age of one and twenty years, and before that he had made a Joynture to A his Wife, daughter of the Testator Heywood, Then if the sayd Defendant caused one hundred pounds to be payed to the said Heywood, within three moneths after the death of the said William, that then the Bond should be void, and the said William Fulmerstone dyed 30. Septem. 30 Eliz. which matter he is ready, &c. The Plaintiff doth traverse, absque hoc, that the said Heywood dyed intestate. Tanfield, It appeareth of Record that the Plaintiff hath not cause of action, for this one hundred pounds, was to be paid within three Moneths after the death of William Fulmerstone, as the Defendant hath alledged, which is also confessed by the Plaintiff, and this action is entred Mich. October 30. Eliz. sci. within a moneth after the death of William Fulmerstone, and so before the Plaintiff hath cause of action, and therefore he shall be barred. Gawdy, Where it appeareth to the Court, that the Plain-

Plaintiff hath not cause of action, he shall never have Judgement, as in the Case betwixt Tilly and Worddy, 7 E 4. but here it doth appear that the Plaintiff hath cause of action, for where a man is bound in an obligation, the same is a duty presently, and the condition is but in defeazance of it, which the Defendant may plead in his discharge. Obligation.

Trinit. 31. *Eliz.* In the Kings Bench.

CCLXIII. Windham *and Sir* Edward Cleers *Case.*

ROger Windham brought an action upon the Case against Sir Edward, declared that the said Ed. being a justice of Peace in the County of N. and where the Plaintif was a loyall subject, and of good fame all his life time, nor ever touched, or reproched with any offence of Robbery &c. the Defendant, malitiose & invide machinans ipsum Rogerum, de bonis, nomine, fama et vita deprivare, directed his warrant to divers Baylifs & Constables of the said County to arrest the said Plaintiff: and it was alledged in the said Warrant, That the Plaintiff was accused before him of the stealing of the horse of. A. B, by reason of which the Plaintiff was arrested, and so detained untill he had entred into a Bond for his appearance, &c. whereas in truth, he was never accused thereof, nor ever stole such horse, and whereas the Defendant himselfe knew that the Plaintiff was guiltlesse; by reason of which, he was greatlie discredited, &c. And it was found for the plaintiff; And it was moved, that upon this matter an action doth not ly, for a Justice of Peace if he suspect any person of Felony, or other such Offence may direct his Warrant to arrest him. 14. H, 8. 16 Gaudy and Clench, If a man be accused to a Justice of Peace for Felony, for which he directs his Warrant to arrest him, although the accusation be false, the Justice of Peace is excused, but if the partie in truth was not accused before the Justice, it is otherwise: It was a Case latelie betwixt the Lord Lumley and Foord, where Foord in a letter written by him, had written, It is reported, That my Lord Lumley seeketh my life: If it was not Reported, an action upon the Case lyeth, but if reported, no Action lyeth: so here, if he was accused no Action lyeth, but if not, an Action lyeth: And afterwards in the principall Case, Judgment was given for the plaintiff. Action upon the Case of sclander.

Trinit. 31. *Eliz.* in the Kings Bench.

CCLXIV. *Isleys* Case.

ISlley and others were plaintifs in an Ejectione firmæ, and upon the generall Issue it was found for the plaintiffs, and 4. dayes after the verdict given, was moved in stay of judgment a speciall matter in Law, wherof the Justices were not resolved for the law, but took advisement and gave day over; and in the moane time one of the plaintiffs dyed, which matter the defendant shewed to the Court in further stay of the Judgment: But by Coke, the same is not any cause, for the Postea came in Quindena Pasc. which was 16. Aprilis, at which day the Court ought to have given Judgment presentlie, but, tooke time to be advised, and the 19, of Aprill, one of the plaintiffs dyed. And the favour of the Court ought not to prejudice us; for the judgment here shall have Relation to the 16. of Aprill. at which time he was alive; and it was so of late adjudged in the Case of Derick James, who dyed the day after the verdict, and yet Judgment was not stayed, for the Court after verdict cannot examine surmises, and they have not day in Court to plead, and in

our case, It was but a day of Grace, and no entry is made of it; Although no plea can be now pleaded after verdict, yet as amicus curiæ, one may inform us of such matter, And sometimes in such case, Judgement hath been stayed, as 9 Eliz. and sometimes notwithstanding such Exception as 2 Eliz. So as I conceive the matter is much in the discretion of the Justices, And because the same was a hard verdict, and much against the Evidence, It is good discretion upon this matter to stay Judgement, and such was the opinion of the Court.

Trin 31. *Eliz.* in the Kings Bench.

CCLXV. Steed *and* Courtneys *Case.*

Error. ERror was brought upon a Fine levied upon a Plaint in a writ of Covenant in the City of Exceter. And two Errors were assigned: First, The plaint was, quod teneat convent. de duobus tenementis. Whereas in truth, the word Tenement doth not comprehend any certainty, for in the

Prescription to levy a fine, not good. word (Tenement) is understood, Messuage, Land, Meadow, pasture, &c. and whatsoever lyeth in tenure: And 11 H. 6. 18. by grant of Lands and Tenements, Rent or Common shall passe. And an Ejectione firmæ doth not ly of a Tenement, nor a forcible entry supposed in a Tenement, 11 H. 7. 25. and 38 H. 6. 1. Another error was, because the Fine was levyed in the Court of the City of Exceter. Which see 44 E 3. 37, 38. those of Exceter can prescribe to have the Conusans: but the same ought to be by speciall Charter of the King by expresse words: Egerton the Queens Solicitor, who sate under the Justices, and was not of Counsel in the case said, That he was of Councell in a case betwixt Bunbery and Bird, where such a Fine levyed in Chester by prescription was in question, was by a Writ of error reversed: and afterwards in the principal case the Fine was reversed for the first Error.

CCLXVI. *Trinit.* 31 *Eliz.* In the Kings Bench.

Devises. THe Case was this, Grandfather, Father, and Son: The Grandfather seised of a house called the Swan in Ipswich, devised the same to his eldest Son for life, the Remainder to A son of his eldest Son, and the heirs males of his body, the Remainder to the right heirs of the Devisor, and to the heirs males of his body, and dyed. The Father and Son dyed without issue male, the Son having issue a Daughter, who entred and assured the Land unto one Hawes, and covenanted, That she was seised of the said Messuage of a certain and sure estate in Fee-simple. Godfrey, That the Daughter shall take the last Remainder, as right heir at the time that it ought to be executed. and to the heirs males of her body, as if it had been devised to her by her proper Name, so she hath but an estate tail, and so the covenant is broken. Cook contrary: At the time that the devise took effect by the death of the Devisor, the Father was his Right heir, so as the Remainder rested in him immediately, and shall not expect in abeyance untill the Father and Son dy without heir male of the Son, for the Father is a person able to take, so that upon the death of the Devisor, the Father is Tenant for life, the Remainder to the Son, and the heirs males of his body, the Remainder to the Father in tail ut supra, the Reversion to the Father in fee, and the daughter hath the same Reversion by discent after the Entayles spend; all which Wray Justice granted.

Mich.

Mich. 31 *&* 32. *Eliz.* In the Common Pleas, *Intrat: Trin.* 31 *Eliz. Rot.* 1529.

CCLXVII. Galliard *and* Archers *Caſe*.

GAlliard brought an action upon the Caſe againſt Archer; The Plaintiff declared, That he himſelf was poſſeſſed of certain goods, which by trover came to the hands of the Defendant, who hath converted them to his own uſe: The Defendant pleaded, That before the Trover ſuppoſed, one A was poſſeſſed of the ſaid goods as of his proper goods, and ſold them to the Defendant, and that he had not any notice, That the ſaid goods were the goods of the Plaintiff, upon which the Plaintiff did demur in Law. And by Anderſon the plea is not good, for the Plaintiff may chuſe to have his Action againſt the firſt finder, or againſt any other, which gets the goods after by Sale, Gift, or Trover; And by ſome, The Defendant having the goods by Sale, might traverſe the finding: See Contr. 27 H. 6. 13. a. And ſee by ſome, In detinue where the Plaintiff declares of a Bailment, The Defendant may ſay, That he found them, and traverſe the Baylment, 39 H 6. 37. by Moile, and by Windham Juſtice, The Defendant may traverſe the property of the goods in the Plaintiff, 12 E 4. 11. Trover and Converſion.

Mich. 31 *&* 32 *Eliz.* In the Common Pleas.

CCLXVIII. Edwards *and* Tedburies *caſe*.

EDwards of London was endebted unto one A of the ſame City, and Edwards delivered goods to one Tedbury Carrier of Exceter, who went to him to carry for him certain wares, to be carried to Exceter, to certain Tradeſmen there, the ſaid goods to be delivered to them, &c. And ſo the ſaid goods, wares, and merchandizes, being in the poſſeſſion of the Defendant Tedbury to be carryed to Exceter, the ſaid A cauſed them to be attached in the hands of the ſaid Carrier, for the Debt of the ſaid Edwards, The ſaid Carrier being then priviledged in the Common Pleas, by reaſon of an action there depending. And by the clear opinion of the whole Court, the ſaid Attachment ought to be diſſolved: For the Carrier for the reaſon aforeſaid is priviledged in his perſon, and his goods, and not only in his own goods, whereof the property belongs to him, but alſo in ſuch goods in his poſſeſſion for which he is anſwerable to others, &c. And ſo it was adjudged. Bailment of goods to a Carrier. Attachment of goods.

Mich. 31 *&* 32 *Eliz.* In the Common Pleas.

CCLXIX Cockſhall, *and the* Mayor, *&c. of* Boaltons *Caſe*.

HEnry Cockſhal brought an action upon the caſe againſt the Mayor, Town-Clark, and Goaler of Boalton, in the county of L, and declared, That where he himſelf had affirmed a plaint of Debt in the Court of the ſaid Town, before the ſaid Mayor, &c. againſt I. S. and thereupon had cauſed the ſaid J. *S.* to be arreſted, The ſaid Defendants did conſpire together to delay the Plaintiff of his ſaid ſuit, in perill of his debt, had let the ſaid I *S* go at large without taking bayl: Periam Juſtice conceived, That upon that matter, that the action doth not lye, for the not taking of bayl is a judicial act, for which he ſhall not be impeached, but all the other Juſtices were ſtrongly of opinion againſt him, for the not taking of Bail is not the cauſe of the action, but the conſpiracy. Conſpiracy.

Mich.

Mich. 31. and 32 *Eliz* in the Common *Pleas*

CCLXX. Erbery *and* Lattons *Case.*

IN a Replevin, The Defendant doth avow because he is seised of such a Mannor within which there is a Custome That the greater parte of the Tennants at any Court within the said Mannor holden appearing may make By-lawes, for the most profit and best government of the Tennants of the said Mannor &c. and that such By-lawes should binde all the Tennants &c. and shewed further, That at such a Court holden within the said Mannor the Homage there, being the greater part of the Tennants of the Mannor aforesaid, at the Court aforesaid appearing, made this By-lawe, scilicet, That no Tennant of the said Mannor should put into such a Common any steere being a year old or more, upon payne of six pence for every such Offence, and that it should be lawfull to distreyne for the same: And the Court was Cleere of opinion, That the By-law was utterlie void, For it is against Common Right, where a man hath Common for all his Cattell Commonable, to restrayne him to one kind of Cattell, &c. But if the By-lawe had bin, That none should put in his Cattell before such a day, the same had bin good, for such By-law doth not take away, but order the Inheritance; For the nature of a By-law is to put Order betwixt the Tenants concerning their affayres within the Mannor which by law they are not compellable to doe: And by Periam, The Avowant ought to have averred, That this By-law was for the Common profit of the Tennants: See the Lord Cromwells Case. 15. Eliz. Dyer. 322. and afterwards in the Principall Case, Judgment was given against the Avowant.

Mich. 31. and 32. *Eliz.* in the Common Pleas.

CCL XXI. *Wicks* and Dennis *Case.*

Replevin. WIcks brought a Replevin of Dennis, who avowed, That one Dennis his father was seised of the Mannour &c. and granted of it to the avowant a Rent of twenty pounds per annum, and further granted, That if the said Rent be arreare unpaid six dayes after the feasts, &c. wherein it ought to be paid, si licite petatur, That then it should be lawfull to distreyne; The grantour afterward by Indenture Covenanted with the Lord Treasurer and others, to stand seised of the same Mannor, unto the use of himselfe and his heires, until he or his heires have made default in the payment of one hunderd pounds per annum, untill three thousand pounds be paid, and after default of payment, to the use of the Queen and and her heires, until the summ of three thousand pounds should be paid and levyed; The grantor afterwards levyed a fine to the said Lord Treasurer and others to the uses aforesaid, the Rent is arreare; default of the payment of the hunderd pounds is made, Office is found, The Queen seised the land, the Avowant during the possession of the Queen demanded the Rent, and the arrearages thereof, The Queen granted over the mannor to Wick and Bosden, and Dennis the grantee did distrayne for the rent, and arrearages demanded, ut supra, It was moved by Harris, Serjeant That this demand of severall summs payeable at severall dayes before, is not good; for every summ ought to be severallie demanded when it was first due, scil. si licite petatur, scil. within the six dayes: for otherwise without such demand, distresse is not lawfull, and hee resembled it to the case of Sir Thomas Gresham 23. Elizabeth Dyer, 372 of severall Tenders. Periam conceived

conceived that the demand ought to be ſeverall, Anderſon, That the demand is good enough, And as to the demaund made during the poſſeſſion of the Queen, It was holden by the whole Court to be good enough; for although the poſſeſſion of the Queen be priviledged, as to the diſtreſſe, yet the demand is good, without any wrong to her prerogative; for the Rent in right is due, and the poſſeſſion of the Queen is in right charged with it, and the Rent is only recoverable by Petition, and was by way of diſtreſſe, and if the partie ſueth to the Queen by Petition for the ſaid Rent; he ought to ſhew in his Petition, That he hath demanded the Rent, for if the poſſeſſion had bin in a Common perſon, he could not diſtreyne before demand, nor by conſequence have Aſſiſe: And the Rent, notwithſtanding the poſſeſſion of the Queen, is demandable and payable for to entitle the partie unto Petition againſt the Queen, and to diſtreſſe againſt the ſubject when the poſſeſſion of the Queen is removed, And ſee 7 H. 6 40. diſſeiſee may make continuall clayme, although the poſſeſſion of the Land of which he is diſſeiſed be in the King, And 34. H. Br. ſeiſin 48 If the heire at full Age intrude upon the poſſeſſion of the King, and payes Rent to the Lord of his Land holden of a ſubject, the ſame is a good ſeiſin, and ſhall bind the heire after he hath ſued his livery 5 E. 4. 4. and ſee 13 H. 7. 15. That diſtreſſe taken upon the poſſeſſion of the King is not lawfull, but ſeiſin obtained during it, is good. ſo in 21. H. 7. 2.

Demand of a Rent-charge during the poſſeſſion of the King, good.

Mich. 31. and 32 *Eliz.* in the Com. Pleas. *int.* M. 30. and 31. *Rot.* 458.

CCLXXII. Aſhegells and Dennis *Caſe*

ASHegell brought a Quare impedit againſt Dennis, and the plaintiff Counted that the defendant had diſturbed him to preſent ad vicariam de D. and ſhewed that the Queen was ſeiſed of the Rectory of D. and of the Advowſon of the vicaraige of D. and by her letters Patents gave unto the plaintiff Rectoriam prædictam cum pertinentiis, et etiam vicariam Eccleſiæ prædict. And it was holden by the whole Court, That the advowſon of the vicarige by theſe words doth not paſſe; nor ſo in the Caſe of a Common perſon much leſſe in the Caſe of the King: But if the Queen had granted Eccleſiam ſuam of D, then, by Walmeſley Juſtice, the advowſon of the vicarige had paſſed.

Quare Impedit.

Mich 31. *and.* 32. *Eliz.* in the Common Pleas.

CCLXXIII. Collman and Sir Hugh Portmans *Caſe*

IN Ejectione firmæ by Collman againſt Sir Hugh Portman it was found by ſpeciall verdict. That the lands where were holden by Coppie of the Manner of D. whereof Sir. H. Portman, was ſeiſed, and that the plaintiff was Copyholder in Fee, and further found, That the ſaid Sir Hugh, pretending the ſaid Coppy-hold lands to be forfeited, entred into one Communication with Collman touching the ſame, upon which Communication it was agreed betwixt them, That the ſaid Collman ſhould pay to the ſaid Sir Hugh five pounds, which was paid accordingly; and that, in conſideration thereof, Collman ſhould enjoy the ſaid Cuſtomary lands, except one Wood called Combwood; for his life and alſo of Alice his wife, durante ſua viduitate, and that Collman ſhould have Election whether the ſaid lands ſhould be aſſured unto him and his ſaid wife by Copy, or by Bill, &c. and hee choſe by Bill, which was made accordinglie and further found, That the ſaid Sir H. held and enjoyed in his poſſeſſion the ſaid Wood, &c. and upon this matter, The Court was in cleer opinion That here is a good ſurrender of the ſaid lands, and that for life only, and that the ſaid Sir Hugh had the Wood diſcharged of the cuſtomary intereſt.

Ejectione firmæ.

Surrender of a Copy-holder.

Mich.

Mich. 31 & 32. *Eliz.* In the Common Pleas.

CCLXXIV. Thetford *and* Thetfords *Case.*

Debt. IN an action of Debt for Rent, the Plaintiff declared, That Land was given to him, and to T. his wife, and to the heirs of their bodies, and that his wife leased the Lands to the Defendant, and that the Donees were dead, and that the Plaintiff as heir, &c. for rent arrear, &c. and upon Non demiserunt, the Jury found that the Husband and Wife demiserunt, by Indenture, and afterwards the husband dyed, and the wife entred, and within the term dyed: Now upon the matter it seemed clear to Anderson, that the Jury have found for the Defendant, sci. Non demiserunt, for it is now no lease ab initio, because the Plaintiff hath not declared upon a Deed. 1 Ma. Dyer 91. and also the wife by her disagreement to it, and the occupation of the Land, after the death of her Husband, hath made it the Lease of the Husband only.

Mich. 31 & 32. *Eliz.* In the Common Pleas.

CCLXXV. Rockwood *and* Rockwoods *Case.*

Assumpsit. IN an action upon the case, the case was this. The Father of the Plaintiff and Defendant being sick, and in danger of death, and intending to make his Will, In the presence of both his sons the Plaintiff and Defendant, declared his meaning to be, To devise to the Plaintiff his younger Son a Rent of 4. l. per annum, for the term of his life out of his Lands, and the Defendant being the eldest Son (the intention of his Father being to charge the Land with the said Rent) offered to his Father and Brother, That if the Father would forbear to charge the Land with the said Rent to his Brother during the life of his Brother, according to the intention of his said Father; Whereupon the Father asked the Plaintiff if he would accept of the offer and promise of his brother: who answered, he would; whereupon the Father relying upon the promise of his said eldest Son, forbear to devise the said Rent, &c. so as the Land descended to the Eldest Son discharged of the Rent: and the opinion of the whole Court in this case was clear, that upon the whole matter the action did well lye.

Mich 31. & 32 *Eliz* In the Common Pleas.

CCLXXVI. Petty *and* Trivilians *Case.*

Livery of seisin. HUmphrey Petty brought Second Deliverance against William Trevilian, and upon especial verdict the case was, That A was seised of certain Land, and Leased the same for years, and afterwards made a Deed of Feoffment unto B, and a Letter of Attorney to the Lessee, C and D conjunctim vel divisim in omnia & singula terras et Tenementa intrare et seisinam inde, &c. secundum formam Chartæ, &c. Lessee for yeares by himself makes Livery, and seisin in one part of the Land, and C in another part, and D by himself in another part; It was first agreed by the Justices, that by that Livery by Lessee for years his Interest and Term is not determined, for whatsoever he doth, he doth it as an Officer, or Servant to the Lessor. Secondly, It was agreed, That these several Liveries were good and warranted by the Letter of

of Attorney, eſpecially by reaſon of theſe words, In omnia & ſingula, &c. So as all of them, and every of them might enter and make Livery in any and every part. And ſo it was adjudged.

Mich. 31, & 32 *Eliz.* in the Common Pleas.

CCLXXVII. Rigden *and* Palmers *Caſe.*

RIgden brought a Replevin againſt Palmer, who avowed for damage feaſans in his Freehold, the Plaintiff ſaid, That long time before that Palmer had any thing, he him ſelf was ſeiſed, untill by A B and C diſſeiſed, againſt whom he brought an Aſſiſe and recovered, and the eſtate of the Plaintiff was mean between the Aſſiſe, and the recovery in it, The Defendant ſaid, That long time before the Plaintiff had any thing, One Griffith was ſeiſed, and did enfeoff him, abſque hoc, that the ſaid A B and C vel eorum aliquis aliquid habuere in the Lands, at the time of the Recovery, Walmeſley Juſtice was of opinion, That the War unto the Avowry, was not good, for that the Plaintiff hath not alledged, That A B and C were Ter-Tenants tempore recuperationis, and that ought to be ſhewed in every recovery, where it is pleaded. And then when the Defendant traverſeth that which is not alledged it is not good: Windham contrary: For the Aſſiſe might be brought againſt others as wel as the Tenants, as againſt diſſeiſors: But other real actions, ought to be brought againſt the Ter-Tenants only, and therefore it needs not to ſhew, that they were Ter-Tenants at the time of the Recovery; and alſo the traverſe here is well enough: Another Exception was taken, becauſe the Avowry is, That the place in which conteineth in 100. Acres of Land, the Plaintiff in bar of the Avoway ſaith, that the place in which, &c. conteins 35. acres, &c. but that exception was not allowed, for it is but matter of form, & is helped by the Statute of 27 Eliz. Another exception was taken, as to the hundred of Cattel, and doth not ſhew in certain, if they were Ewes, or Lambs, or how many of each: which alſo was diſallowed, for the Sheriff upon Retorno habendo may enquire what cattel they were in certain, and ſo by ſuch meanes the Avowry ſhall be reduced to certainty.

Replevin.

Avowry.

Mich. 31. & 32. *Eliz.* in the Exchequer Chamber.

CCLXXVIII. Ruſſel *and* Prats *Caſe.*

RUſſel brought an action upon the caſe againſt Prat, and declared, That certain goods of the Teſtator caſually came to the Defendants hands: and upon matter in Law Judgement was given for the Plaintiff, ſed quia neſcitur quæ damna, &c. Ideo, A writ of Enquiry of Damages iſſued, and now Prat brought a Writ of Error in the Exchequer Chamber upon the ſtatute of 27 Eliz. cap. 8. But note, That the Judgement was given before the ſaid Statute, but the Writ of Enquiry of damages was returned after the ſaid Statute, & the ſaid Statute doth not extend, but to Judgements given after the making of it. And it was moved, That the ſaid Judgement is not to be examined here, but by the clear opinion of Anderſon, Manwood, Windham, Walmeſley, Gent, and Clark, Juſtices of the Common Pleas, and Barons of the Exchequer the Writ of Error lyeth here, by the Statute, for in an action of Treſpaſs (as this caſe is) full judgement is not given, untill the Writ of damages be returned, and if before the Return of it any of the parties dieth, the Writ ſhall abate: and the firſt Judgement which is given before the Award of the Writ is not properly a Judgement, but rather a Rule, and order, and ſo in a Writ of accompt, where Judgement is given that the De-

Error.

Writ of Enquiry of Damages.

fendant computet cum querente, he shall not have Error upon that matter for it is not a full Judgement. See 21 E 3. 9. So as to the Judgement in a Writ of Tresspas, sci. That no Writ of Error lyeth before the second Judgement after the Return of the Writ of Enquiry of Damages are given: And also it was holden by all the said Justices and Barons, That an Executor shall have an action upon the case de bonis testatoris, casually come to the hands and possession of another, and by him converted to his own use: in the life of the Testator, and that by the Equity of the Statute of 4 E 3. 7. de bonis asportatis in vita Testatoris.

Action, *de bonis Testatoris.*

Mich 31. & 32 *Eliz.* in the Common Pleas.

CCLXXVIII. Arrnudel *and the* Bishop *of* Glouceſters, *and* Chaffins *Case.*

Quare Impedit. Sir John Arrundel brought a Quare Impedit against the Bishop of Glouce-ster, and Chaffin, and counted upon a disturbance to present 1 Novembris. Chaffin, as Incumbent pleaded, That 1 Maii next after the said 1 Novemb. he himself was presented to the Church by the Queen, the presentment to the said Church being devolved unto her by Lapse. Upon which the Plaintiff did demur in Law: and the plea was holden insufficient, for the Plaintiff counted upon a Disturbance to him 1 Novemb. and the Defendant entitleth himself to an incumbency 1 May after, in which case the disturbance set forth in the Count is not answered by traverse, nor confessed, nor avoided: And of that opinion was the whole Court: For the disturbance of which the Plaintiff hath declared is confessed. And afterwards, It was moved by the Queens Serjeants, That the Queen might have a Writ to the Bishop, for the title of the Queen appeareth to be by Lapse which is confessed, But the whole Court were clear of opinion against it, For although it appeareth that he was lawfully presented to the said Church, and so once lawfull incumbent, yet it appeareth also, That the title of the Queen is once executed, and so gone, and nothing remains in the Queen, and now when the Defendant hath lost his incumbency by ill pleading (as he may) as well as by Resignation or Deprivation, yet the same shall not turn to the advantage of the Queen, for where the Queen presents for laps, and her Clark is instituted and inducted, the Queen hath no more to do, but the Incumbent must shift as well as he can for the holding of it, for by what manner so ever he looseth his incumbency the Queen shall not present again, otherwise it had been, if the Queen be Patron, and afterwards the Plaintiff had a Writ to the Bishop.

Writ to the Bishop.

Mich. 31 & 32 *Eliz.* In the Exchequer Chamber.

CCLXXIX. *The Lord* Pagets *Case, in a* Monstrans de Droit, *The Case was,*

THomas Lord Paget, Father of William Paget, was seised of the Manor of Burston, and diverse other Mannors in three several Counties in his demesne as of fee, and so seised by Indenture, between the said Lord of the one part, and Trentham and others on the other part, and in consideration that the said Trentham and others, with the profits of the said Mannours should pay his debts, and such summes of money which were contained in such a Schedule, and which he should appoint by his last Will, covenanted to stand seised of the said Mannors to the use of the said Trentham

of one Eusal, &c. for the term of four and twenty years, and after the Expiration or end of the said Term of twenty four years, unto the use of the said William Paget, his Son in tail, with diverse Remainders over: And afterwards the said Lord Paget was attainted of high Treason. It was here holden and agreed by all the Justices, and by the Council of both sides, That the uses limitted to Trentham, and others are void, for here is not any consideration sufficient to raise an use, for the money which is appointed for the payment of his debts is to be raised of the profits of the Lands of the said Lord, which is not any consideration on the part of Trentham and others: But if the consideration had been, That they with the Profits of their own Lands should pay the debts, &c. It had been a good Consideration: It was agreed also, That the term for twenty four years to Eusal is void for want of sufficient consideration: And then it was moved, If this Lease being void, The use limitted to the said William Paget, son of the said Lord Paget should begin presently upon the death of the Lord Paget or should expect untill the twenty four years were encurred after the death of the Lord Paget, or not at all. And it was argued, That an use to be raised upon an impossibility should never rise, as if I covenant to stand seised to the use of B and his heirs, after the end of the term for years, which I S hath in the Mannour of D, whereas in truth, I S hath not any term in it, the said use shall never rise: so here, No use to the Son can rise, for the lease for twenty four years shall never end, for it never can begin for want of sufficient consideration as is aforesaid; and if the said use in tail should at all arise, it should not rise before the expiration of the said twenty four yeares. As if I covenant to stand seised of certain Lands to your use when my Son and Heir shall come to the age of one and twenty years, now if my Son dyeth before such age, The use shall not begin before the time in which my Son (if he shall live) should attain unto his said age. Egerton the Queens Solicitor, Uses may be limitted to begin at times certain before which they shall not begin: and so in our case, the use in tail is limitted to begin when the term of twenty four years, is ended, and therefore untill the Term be ended no use shall rise: and the use is limitted to rise upon the end of the time or term of four and twenty years, and not upon the end of the estate; and so William Paget hath begun his Monstrans de Droit, before his time. The Lord Paget had but an estate for life, and if so, Then the Remainders are not contingent uses, but vest presently: as if a man covenant, That after his death his Son, and heir shall have his Lands, now the Father hath but an estate for life, and the inheritance is vested in the Son. Cook, I covenant, That after twenty four years ended, I and my heirs will stand seised to the use of my Son, &c. there the use in Fee doth vest in my son presently, So I covenant, That after my death, I and every one who shall be seised, &c. shall be seised of the said Land to the use of my Brother, the said use shall rise to my Brother presently: I devise, That after the death of such a Monck, I S shall have the Land, nothing passeth to I S till the death of the Monck; but if Land be devised to a Monck for life, and afterwards to another in Fee, the Devisee in Fee shall have the Land presently. Manwood, A devise or use limitted to one for life, the Remainder in tail, the first devisee doth disagree. Cook, the Remainder doth vest presently, Manwood, I devise lands unto one until my son comes of full age. Cook, The remainder doth vest presently. Manw. A use limitted to one to begin at Mich. next, the remainder over, if in the mean time the Lessee obtain the good will of I S, which he cannot obtain, the same remainder is not good. And if one covenant to stand seised to the use of Salisbury plain, for the life of I S. and after the remainder to A; it is a plain case, That he in the remainder shall take presently, 37 H. 6. 36. Cestuy que use willed, That his Feoffees should make an estate to A for life, the remainder to C in fee, and A would not take the estate, C shall

Declaration of uses.

Use cannot rise out of a possibility.

have a Subpœna againſt the Feoffees after the death of A. See there the caſe; And if Land deviſeable, be deviſed to one for life, the Remainder over to another in Fee, and the Deviſee for life doth refuſe; Quære, if the Deviſee in Remainder ſhall enter preſently, See Fitz. Subpœna; And alſo he put the Caſe, where Land is deviſed to a Monck for life, the Remainder over to another in Fee, he in the Remainder ſhall enter preſently, ſee the ſame Caſe in Perkins 108. for the Monck never took any thing by the deviſe, notwithſtanding that there is not any particular eſtate upon which a Remainder can depend, yet the intent of the Deviſor ſhall be obſerved in as much as it may, and the particular eſtate limitted to the Monck is meerly void, of which every ſtranger ſhall take advantage, &c. And it was reſembled to a Caſe in Baintons Caſe, where an uſe in Remainder limitted upon good conſideration ſhall be good in Law, although the particular uſe be not grounded upon good conſideration, and ſo faileth: And he urged a Caſe alleadged by Popham in the Caſe of the Earle of Bedford, that if in Cranmers Caſe, the eſtate for yeares limitted to the Executors, had been limitted to Adminiſtrators, it had been meerly void, and the uſe in tail limitted in tail ſhould begin preſently, and that was by reaſon of the interball betwixt the death of Cranmer, and the taking of the Letters of Adminiſtration, in which meane time there is not any perſon capeable, and therefore the Remainder ſhall veſt preſently, which is a fit caſe to prove the Caſe at Bar: And he remembred that in the Argument of Cranmers Caſe, Lovelace Serjeant, would have an Occupancy in the Caſe of ſuch a Terme limitted to Adminiſtrators, quod omnes juſticiarii negaverunt, and in the ſaid Caſe of Cranmer, it was holden that the Leaſe for yeares being void, the eſtate in the Remainder did begin preſently, without expecting the effluxion of the yeares, &c. And truly, a Terme impoxts in it ſelfe an Intereſt, but if the limitation had been after the Terme of twenty foure yeares, &c. the ſame implyeth but a bare time: And to that purpoſe he cited the Caſe 35. H. 8. Br. Expoſition, 44. A Leaſeth to B for ten years, and it is covenanted betwixt them, that if B pay unto A within the ſaid ten yeares one hundred pounds, that then he ſhall be ſeiſed to the uſe of B in Fee, B ſurrenders his Terme to A, and within the ſaid ten yeares payes the one hundred pounds to A, here B ſhall have Fee, for the yeares are certain; contrary, if the Covenant had been, If he pay within the Terme.

Uſe what it is.

Popham Attorney Generall Contrary, The uſe ſhall not go beyond the Contract, and here the Terme doth not veſt, in that it was Limited for want of ſufficient conſideration, of the Lord Paget, and the intent was not that his ſon ſhould have poſſeſſion of the Land before the terme of 24. yeares expired.

A uſe is a thing in Conſcience, according to confidence to be guided by the intent of the parties: and upon ſuch Caſe at the Common Law W. Paget ſhould not have a Subpœna before the years expired, and this word (Terme) doth not alter the Caſe; and there is a great difference betwixt an uſe raiſed by Feoffment and an uſe raiſed by Covenant, For in the firſt caſe the Feffor doth diſpoſſeſs himſelfe utterlie, and if it takes not effect to one purpoſe it ſhal take effect to another purpoſe: But in the Caſe of a Covenant: it is otherwiſe, for the uſe riſeth according to the contract and not otherwiſe, and here the Contract is, That W. Paget ſhall have the Land not immediatly after the death of his Father, but after the 24, yeares expired.

Owen Serjant, It hath bin agreed of both ſides, That every uſe ſhall go according to the intent of the parties, and here it appeareth, That it was the intent of the Lord Paget, to put all the uſe out of himſelf, and I ſee not any difference betwixt an uſe raiſed by Covenant and a uſe raiſed by Feoffment For a uſe limited utrovis modo to Paules Steeple for the life of A. and after to the uſe of B in Fee, the firſt uſe is void, but the ſecond good, and here the meaning of the Lord Paget plainlie appeares, for there is a Proviſo in the Indenture, That after the ſaid debts and legacies paid the uſe limitted for

24 years shall cease, and it is expressely averred, that they are paid 11. H. 4. A leaseth for life, the remainder in tail to himself, the Remainder over to a stranger in Fee, the meane Remainder limitted by A. to himselfe is void, and the remainder over shal be immediate to the estate for life. Egerton, The words of the Indenture, and the intent of the parties are the rules of uses; The first use is void, For the intent of the Lord Paget was void, because contrary to the Law, and Eusall, to whom the use for yeares was limitted, could not take presentlie, for his estate is limited to begin after the death of the Lord Paget, and there is a great difference betwixt uses raised by Covenant, and by Feoffment, For when a use is raised by Feoffment, there all is out of the Feoffor, the land is gone, the use is gone, the trust is gone, nothing remaineth but a bare authority to raise uses out of the possession, of the Feoffees, and being new uses, there, although some of them be void, yet the other shall stand, but where a use is raised by way of Covenant there the covenantor continues in possession, there the uses limited, if they be according to Law, shall raise and drawe the possession out of him, but if not, the possession shall remaine in him, untill a lawfull use shal arise, which before its time shall not rise for any defect in the precedent use: And here is no Term, therefore no end, for that which hath not a begining hath no ending, And if there be no estate, then no Terme, and if there be so, then it is to be taken for the time of 24. years, which is not as yet expired, and then was there in the Lord Pawlet an estate descendable for 24. yeares, which by the Attainder doth accrue unto the Queen. And he cited the Case of 13. Eliz. Dyer. 300, Feoffment to the use of himselfe for life, and afterwards to the use of a woman which he entendeth to marrie, untill the issue which he should beget on the said woman should come unto the age of 21. years, and then to the use of the woman during her widdow-hood; They are married, the husband dyeth without issue, the wife shal hold the land: But by him, if this use had bin raised by way of Covenant it should be otherwise. Coke, Admit that all the uses be good, yet his meaning was, That the debts and legacies being paid W. Paget should have his land, for it is provided by the Indenture, That when the debts & legacies are paid, the estate for 24. years shal cease. Manwood, the payment of the debts cannot end that which never was, and as to the two first estates, they were never out of him, therfore they came unto the M. by his attainder. Coke, After debts and legacies paid all other estates but the estate of W. Paget cease, therefore William Paget shall have the Land. And the rule of Shelley 35. H. 8. 56. is worthy to be received, scil. That learning is honest, and wished to be used; that every man learned in the Law, doe construe Deeds according to the meanings of the makers. Manwood, A Feoffment to the use of Salisbury Plaine for the life of I S, the Remainder over, the same use shall come into possession presently, for there is not any person capeable of the particular estate, but where the first use is limitted to a Bastard, the remainder over, there, the Remainder shall not come into possession presently, for the Bastard is a person capeable, but not by such forme of conveyance in consideration of naturall affection; Popham, In the case of Bastard, there was an estate for life executed to the Father in possession, and then a Remainder to a Bastard, the Remainder to the Sons lawfully begotten, but here in our Case no estate is created to precede the estate of William Paget, upon which the Remainder can depend.

At another day, It was argued by Coke, It is to be agreed on both sides, That the estate for four and twenty yeats is meerly void, and also the first use limitted to Trentham and others, and it is not reason, that the use limitted to William Paget, should expect untill the four and twenty years be expired by effluxion of time, and to that purpose he cited Cranmers case, where an estate in use was limitted to Cranmer for life, the Remainder to his Executors for one and twenty years, the Remainder over in tail to his Sonne

and

and heir, &c. Cranmer is attainted of Treason and Heresie, so as he could not make a Will, or Executors, there it is holden, That the term is void, because no Executors, and that the Remainder in use should vest presently, and should not expect untill the said number of years expire by efflurion of time. A difference hath been put betwixt the case of Cranmer, and the case at Bar, because in Cranmers Case there was a possibility at the beginning that the Term for years might be good, for the term became void by matter ex post facto, sci. By the attainder of him, which disabled him to make Executors, but in the case at Bar, the term for twenty four years was expresly void ab initio: But that difference is without reason, for what reason is there, That the Remainder should be farther off the possession when the estate for years is originally void, then when it becomes void by matter ex post facto? Suppose that the Lord Paget had by Indenture covenanted as above for the two first uses, (being in truth void in Law) and afterwards by another Indenture, reciting, That whereas he had covenanted, That in consideration That A. with the profits of his Lands should pay his debts, &c. to stand seised of the said Lands for his own life: Now he covenants, to stand seised to the use of William Paget, and his Heires, should not he presently be seised to the use of William Paget and his Heirs, although the words be, That then and from thenceforth? For I hold it a clear case, that his estate begin presently, being limitted to begin upon a void estate, although the limitation be by words de futuro. And to this purpose he cited the case 3 E 6. Br. Lease 62. A man leaseth for years, Habendum post dimissionem inde fact. to J S. finitam, where no such demise is made, the same Lease shall begin presently: If an Indenture be made to a Monck, and another, Habend. to the Monck for one and twenty years, and after the end of that, to the other for one and twenty years, the other shall have it presently. And he put a Case 7 E 3. in the new Impression, 19. and in the old Impression 317. Where one Maud brought a Formedon in the Remainder, and counted that one Hamond was seised, and gave the said Tenements to one Robert &c. in tail, and that for want of such issue, that the tenements should return to the said Hamond for life, the Remainder to the Demandant in Fee, and counted further, That Robert is dead without issue, and that Hamond is also dead, &c. It was holden, although that the Remainder reserved to the Donor, be void, yet the Remainder over in Fee is good, &c. And in that case, although that the Remainder in Fee was future, sci. After the death of Hamond, and the estate reserved to Hamond meerly void, and that originally, and not by matter ex post facto, yet the Remainder in Fee was good, and should begin presently upon the death of Robert without issue, and should not expect the death of Hamond. Mr. Attorney hath given a Rule, That the intent of the parties is the Direction of uses, as also of Wills, and therefore I will put one Case of Wills, 37 H 6. 17. If a man devise Lands to a Monck for four and twenty years, and after the same ended to another in Fee, here the Monck being a dead person cannot take the estate limitted to him, and therefore it is void: but the Fee limitted to the other is good, and shall take effect presently: If it be so in a Will, why not so also in uses? For the intents of the parties do direct the constructions of both: And our case here is a stronger case, then the case cited 37 H. 6. 36. for there where Land is devised to a Monck for life, there may be colour of an Occupant during the life of the Monck, who might take it, although the Monck himself cannot take it, and so the Remainder doth not take effect presently as to the possession, but shall stay till after the death of the Monck; But here is not any colour of an Occupancy, for the estate here is a Lease for years, which cannot admit an Occupant. And see also 37 H. 6. 36. If a man devise that his Feoffees shall make an estate to I S for life, the Remainder over to C in Fee, and I S will not take his estate, C shall

have

have a Sub-pœna against the Feoffees to make an estate to him, leaving out I S and see Amy Townsends Case in the Commentaries, where the Husband seised in the Right of his Wife, makes a Feoffment in Fee to the use of himself, and his wife for their lives, the Remainder over to another, the husband dyeth, the wife refuseth the estate limitted to her by the husband, She brings Sur cui in vita, not against the heir, but against him in the Remainder, to whom the Land doth accrue by the refusal of the wife; not against the heir of the Feoffor, and I grant, That where an estate in use, or otherwise is to begin upon a condition precedent which is impossible, or against the Law, the estate shall never rise or begin. And here the Case of the Lord Borroughs, 35 H. 8. Dy. 55. was cited, Where the Father covenanted in consideration of marriage of his Son, that immediately after his death his eldest Son shall have the possession or use of all his Lands according to the same course of inheritance, as then they stood, and that all persons now seised, or to be seised, should be seised to the said use and intent, and it was holden, That upon that matter no use is changed: But if the Words had been Immediatly after his death, they should remain then, although the words of the Limitation be In futuro, the use of the Fee shall rest in the Son presently; and the words in futuro ought not to be interpreted, but in benefit of him to whom the use, and estate is limitted. 9 Eliz. Dyer 261. A Leaseth for thirty years, and four years after the beginning of the said term he makes another Lease for years by these words, {Noverint, &c. dictis 30. annis finitis & completis, demisisse omnia præmissa, to the said, &c. Habendum & tenendum a die confectionis præsentium, termino prædict. finito, usque ad finem 30. annorum. And by the opinion of all the Justices, This new Lease shall commence in possession at the end of the former term, and not before, and if it should not be so expounded, the second Lease should be in effect an estate, but for ten years, which was not the intent of the parties, and every grant shall be expounded most strongly for the grantee, and to his advantage, to which purpose he said he had vouched this Case. Also by him there is not any difference, where the use is limitted by way of covenant, or upon a Feoffment: and if a man enfeoffeth B. upon condition that he shall enfeoff C, now if he offer to enfeoff C, and he refuseth, the Feoffor may re-enter, But if the condition were to give to C in tail, then upon such refusal of C the Feoffor shall not re-enter. See 2 E 4. 2. 19 H 6. 34. Et si Equitas sit adhibenda in construction of conditions a multo fortiori, in case of Uses: a Feoffment in Fee upon condition, that the Feoffee shall grant a Rent charge to J S who doth it, but J S refuseth, the Feoffor shall not re-enter, for that was not the intent of the condition: If in the principal case, the limitation of the use had been after the expiration of twenty four years, then no use should rise before the twenty four years expire, but where, not the time, but the estate is material, there, if the estate be void, the use shall go to him in the Remainder presently, and shall not stay the time, &c.

Egerton Solicitor, first it is to see, if the use limited to William Paget be good, secondly, if William Paget doth not come before his time to shew his Right: If this use limited to William Paget be a Remainder or an estate to begin upon a contingent, or a present estate, the estates formerly limited being void, and he conceived, that it is not a Remainder, for there is not any estate upon which it may depend; And the words are after the estate for twenty four years ended or expired, that then and from thenceforth to the use of William Paget. &c. so that no use is limmitted to him before the particular estate is ended, therefore no Remainder, for a Remainder ought to begin when the particular estate begins. Without doubt that was not the intent that William Paget should have the Land during the life of his Father, and yet the use limitted during the life of his Father, was void, and if the Remainder should take effect during the said twenty fours yeares against Euſall

and

and his companions, wherefore should it not also take effect against Trentham and the others, to whose use it was limitted during the life of the Lord Paget: And here, the use limitted to William Paget is to begin upon a collaterall contingent, upon which if it cannot rise, it shall not rise at all, and I conceive that the use limitted to William Paget, shall never rise, or begin, for it is limitted to begin when the terme of twenty four years is ended, and that is never, for that which cannot begin, cannot end, and this Terme is meerly void, Ergo, it cannot begin, Ergo, it cannot end, then this thencefoyth cannot be, and so this contingent can never fall, H. 6. & 7. E. 6. A Lease was made for yeares upon condition, that if the Lessee doe not pay such a summ of money, that he should lose his Indenture, the meaning and sence of these words is not that he should lose the Indenture in parchment, but that he should loose his Terme: The Judgement in an Ejectione firmæ, is, Quod querens recuperit terminum suum, that is to be understood, not the time, but his Interest in the Land for the Term (and Coke secretly said, that in that Case there is not any contingent, for the estates precedent never began) And as to the Case cited before by Coke, Br. Leases 62. If the last Lease be made by Indenture, reciting the former Lease, certainly the second Lessee shal ont be concluded to claime the Land demised presently, but shall tarry untill the yeares of the first Terme be expired by effluxion of time. And as to Mawnds Case cited before, there is an estate upon which a Remainder may depend, scil. the estate tail alleadged to Robert, &c. If such as now is limitied to William Paget had been limitted at the Common Law to a younger Son, the eldest Brother should have the Land in the Interim discharged of any use, and now after the Statute, no use limitted to William Paget, before the contingent; where, therefore, is it in the meane time? In the Lord Paget, who being attainted, it accrues to the Queen; and out of the possession of the Queen, this use shall never rise, although that the contingent be performed, for now the use is locked up; A use doth consist in privity of the estate and confidence of the person, if these be severed, the use is gone: And here, if the possession be in the Queen, shes cannot be seised to another use. Note by Godfrey, that the opinion in Baintons Case, 8. Eliz. Dyer 3. 7. is not Law, and so hath the Law been taken of late; Popham contrary; If before the Statnte of 27 H. 8. the Father covenant in consideration of Advancement of his Son to stand seised to the use of I S for life, and after the death of I S, to the use of my Son in Fee, here the estate of I S in the use is void, and yet the estate in the use limitted to my Son, shall not take effect before the death of I S; for the estate of my Son is not limitted to take effect till after the death of I S, and therefore the possession of the Father is not charged with the use during the life of I S; But if by way of Feoffment I S had refused, the Son should have it presently, and the Father should not have it, for he by his Livery hath put all out of him, and it was not the intent of the Feoffment, that the Feoffee should have the Land to his own use: Popham allowed the difference mentioned before out of 2 E. 4. & 19. H. 6. betwixt a Feoffment upon condition to enfeoff a stranger, and to give in tail to a stranger, and that is grounded upon the intent of the parties. And Owen Serjeant put the Case cited before 13 Eliz. Dyer 330. A Feoffment is made by the Husband to the use of himselfe for life, & afterwards to the use of one Anne, whom he intended to marry, for, during, and untill the Son which he should beget on the body of the said woman had accomplished the age of thirty one years, and after such time that such Son should come unto such age unto the use of the said woman, quamdiu, shee should live sole, they en-termarry, the Husband dyeth without Issue, the wife entreth immediately, and continues sole, and her Entry was ajudged lawfull, and the estate in Remainder good, although shee never had any Son, and thereupon a Writ of Error was brought, and the first Judgement was affirmed (and note by Tanfeild, and others at the Bar, that that was the most

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apt case to the purpose in the Law) & the reason of such Judgment was, because they took it, that Deeds ought to be expounded according to the meaning of the parties, and estates in possession: I grant there ought to be a particular estate, upon which a Remainder may depend, but the same is not necessary where the Conveyance is by way of use: And if I covenant that A shall have my Lands to him and his Heirs, to pay my Debts and Legacies, the same is by way of bargaine and sale, and nothing passeth without Enrolment. And here the Attainder doth not prevent the use, as it hath been objected by Master Solicitor, for the use doth rise before the Attainder, for William Paget had a Remainder in tail, in the life of his Father, upon the first limittation, &c. Periam Justice, I lease my Lands to you, to begin after the expiration of a Lease which I have made thereof to I S, and in truth he hath not any Lease, the same Lease shall never begin. Manwood cheife Baron, I lease my Lands to you, or grant a Rent to you to begin after the death of Prisoit Serjeant at Law, when shall that begin? Coke, Presently: Manwood, cujus contrarium est Lex.

Mich 31. & 32 *Eliz.* In the Common Pleas. *Rot.* 1832.

CCLXXX. *The Queen against the Arch-Bishop of* Canterbury, Fane, *and* Hudson.

Quare Impedit

The Queen brought a Quare Impedit against the Arch-Bishop of Canterbury, the Bishop of Chicheſter and Hudson, and counted that John Ashburnham was seised of the advowson of Burwash, and was outlawed in an action of Debt, during which Outlawry in force, the Church voided, for which it belongs to the Queen to present; the Arch-Bishop and Bishops plead, that they claime nothing but as Metrapolitan and Ordinary: Fane pleaded that King E. 4. Ex gratia sua speciali, &c. and in consideration of faithfull service, &c. did grant to the Lord Hastings the Castle and Barony of Hastings, and Hundred, &c. Et quod ipse haberet omnia bona & catalla tenentium, residentium & non residentium, & aliorum residentium quoramcunque hominum, de & in Castro, Baronia, &c. or within the same, pro munero debit, &c. tam ad sectam Regis, &c. quam, &c. Ut legatorem, & quid ipse faceret, per se vel per, his sufficient Deputies, &c. And from him derived to the now Earle of Huntington as Heirs; and the said Earle so seised, and the said Ashburnham seised of the advowson as appendant to the Manor of Ashburnham, holden of the said Barony: The Church aforesaid during the Outlawry aforesaid, became void, For which the said Fane, ad dictam Ecclesiam usurpando presentavit, the said Hudson, who was admitted and instituted, &c. with this, That idem T. C. verificare vult, that the said Church of Burwash is, and at the time of the grant was, within the Precinct, Liberty, and Franchise aforesaid, and that the said Manor of Ashburnham, at the time of the grant aforesaid was holden of the said Barony: and the Incumbent pleaded the same Plea: and if by that grant of King Edward the fourth, to the Lord Hastings, scil. omnia bona & catalla, &c. The presentment to the Church should passe or not, was the question. Shutleworth Serjeant, argued for the Queen, he confessed that the King might grant such presentment, but it ought to be by speciall and sufficient words, so as it may appeare by them, that the intent of the King was to grant such a thing, for the generall words (omnia bona & catalla) will not passe such speciall Chattell in the Kings grant:

And he conceived that by the ſubſequent words, no Goods or Chattells ſhall paſſe by ſuch Grants, but ſuch which may be ſeiſed, which the avoidance of a Church cannot be, & quod ipſe liceret, per ſe vel miniſtros ſuos ponere ſe in ſeiſinam, 8 H. 4. 114. 15. the King granted to the Biſhop of London, that he ſhould have Catalla felonum & fugitivor. de omnibus hominibus & tenentibus de & in terris & feodis prædict. and of all reſiants within the Lands and Fees aforeſaid, Ita quod, ſi prædict. homines, tenentes & reſidentes de & in terris & feodis prædict. ſeu aliqui eorum, ſeu aliquis alius infra eadem terra & feodis pro aliqua tranſgreſſione, &c. vi. librum, &c. and by Tirwit, By that Grant the goods of thoſe who are put to Pennance ſhall not paſſe, ſo of the goods of one Felo de ſe, vi. 42 E. 3. 5. One being impannelled on the Grand Enqueſt before the Juſtices of Oyer and Terminer, pleaded the charter of the King of exemption from Enqueſts, and becauſe in the ſaid charter was not this clauſe, licet tanget nos & hæredes noſtros, upon challenge, it was rejected, and the party charged and ſworne: and if the King grant to me to appropriate an advowſon, which in truth is holden of the King, ſuch a grant is void, if there be not ſpeciall words by which it might appeare that the King had notice of it, and that his intent was that the grant ſhould extend unto it, 16 E. 3. Grants 58. & 33 E. 3. Grants 103. So here the Preſentment is a ſpeciall chattell, and is not uſually intended or thought upon, when men ſpeak generally of goods and chattells: But admit that it be, yet the Plea doth not lye in the Defendants to plead, for they do not derive any Intereſt under this grant, but are meere ſtrangers to it, and therefore they ſhall not take any advantage, by laying this grant in the Queens way, for the Queen hath good title againſt all perſons but thoſe who claime under the grant, but that is nothing to the Defendants, for one cannot croſſe the title of the King, if he doe not make a title to himſelfe, As 39 E. 3. 18. 37 E. 3. 11. If the title of the King be found by a falſe Office, the party greived cannot traverſe the Kings title without making title to himſelfe found by Office, and then the King may chooſe whether he will maintaine his own title found by Office, or traverſe the title of the other. Walmeſley, contrary: This Title of Preſentment is a Chattell, Rex habebit omnia catalla felonum, &c. A Terme of yeares is a Chattell, ſo the Iſſues and Profits of the Lands of men outlawed for Felony, ſo a right of Action for Goods; Therefore a Title to preſent; and if ſuch a Title accrue to the King, by ſuch generall words they ſhall paſſe from the King, and as to that which hath been objected, That the Grant of King Edward the fourth doth not extend only to ſuch Goods and Chattells which may be ſeiſed, he cited the Caſe of 39 H. 6. 35. b. Where the Grantee of a Rent for Terme of yeares granted, omnia bona & catalla ſua, tam viva quam mortua, the Rent doth paſſe, and yet the Grantor cannot put him in ſeiſin of it but ought to expect the day of payment of it. And this Title to preſent is not a thing in action, for if no diſturbance be made, the party may have the benefit of it without any action. Anderſon conceived, That this Title to preſent cannot paſſe by thoſe generall words (bona & catalla) for they doe not extend to Rights, or things in Action, for ſuch things only which are commonly known and underſtood, ſhall paſſe by ſuch words: By grant of Goods, Chattells reals will not paſſe, for when men ſpeake of Goods; Houſehold ſtuff, mony, and ſuch perſonall things only are underſtood, So a man cannot be ſaid to have a Chattell but where he is poſſeſſed of it, and here this Intereſt is but jus præſentandi.

Periam,

Periam, This Interest is a Chattell, for if the Church become void, and before presentment the Patron dyeth, the Executors shall have the presentment, for it was a Chattell vested in the Testator: It was adjorned.

Hill. 31 *Eliz. Rot.* 1527. In the Common Pleas.

CCLXXXI. Jones *Case.*

HEn. Jones had stolen the Plate of Trinity College in Oxford, and by mediation of his freinds it was concluded, and agreed that no Evidence should be given against him at the Sute of the College, and that the College should be recompenced for the losse, and two of his Freinds, Brien and Brice were bounden unto Doctor Unherhill, Rector of Lincoln College in Oxford, (but unto the use of the Master and Schollers of Trinity College) upon condition that if the said Obligor paid forty pounds within six moneths after, the said Hen. Jones should be acquitted & released of the troubles wherein he now is, with the safety of his life, that then, &c. In debt upon Obligation The Defendants pleaded that he was indicted at the Assises at Ox. & arraigned upon it, scil. for the stealing of the said Plate, & found guilty thereof, and had his Clergy, and was burned in the hand, and he demanded Judgement of this Action, upon which there was a Demurrer: Wind. If the words had been to pay the money, after that Henry Jones should be released and acquitted of the troubles in which he now is without any more, the Defendants had been bounden to pay the mony. Periam, If the words of the condition had been, that after Henry Jones should be acquitted of the Felony, then no mony payable, but here the words are with safety of his life: but here he conceived, that the intent of the Obligation was, that no Evidence should be given, and so to save his life from the Gallows, for which the Defendants might have shewed the speciall matter, and averred that the Obligation was made for the discharge of a Felon, and so against the Law &c. but now, they cannot take advantage of it, and afterwards Judgment was given for the Plaintiff.

Pasc. 31. *Eliz.* In the common Pleas.

CCLXXXII. Castle *and* Oldmans *Case.*

Debt.

CAstle brought Debt against Oldman for a pain assessed in a Court Baron, and declared That the Defendant was presented at the Court Baron for such an offence, and if he did not amend it before the next Court, he should pay such a pain: And at the next Court it was presented, That the Defendant had not amended it, and so he had incurred the pain upon which the Action is brought, and now the Defendant would wage his Law, and it was much doubted whether wager of Law lay in the Case. Shutleworth, 13. H. 7. 31. Upon a Recovery in a Court Baron, wager of Law lyes not, by Conisby, which Periam denyed; And by him upon an account by another hand, it doth not lye, for it is a matter of which the Country may have Conusance, so here the matter is notorious, which lyeth in the knowledge of all the Jurors who presented it: And by him, the pain ought to be afferred, which Anderson denyed. For there is a difference betwixt an amercement and a paine, which Windham granted. And see for the amerciament in the Leet, 10 H. 6. 7. 12 R. 2 Ley. 43. But in a Court Baron, because it is not a Court of Record; so in Debt upon an Arbitrament, the Law lyeth. And Waler one of the Secondaries shewed

unto the Court a Preſident, 6 Eliz. Where debt was brought by Sir Thomas Tyndall, upon a pain forfeited for the breaking of a By-law in a Court Baron againſt Tyler; and the party was received to Wage his Law.

Paſch. 31. *Eliz.* In the Common Pleas.

CCLXXXIII. Thetford *and* Thetfords *Caſe.*

IN Waſt the Plaintiff declared, upon the demiſe of the moyety of the Mannor, whereof part of the Tenants were Copy-holders, and part Free-holders, and that A was ſeiſed of the Mannor, and had iſſue two Daughters, and dyed ſeiſed, the Daughters entred, and made partition of the Demeans only, but the Services of the Free-holders and Copy-holders did remaine in Common; One of the Daughters took Husband, the Husband and the Wife make a Leaſe of the moyety of the Mannor to the Plaintiff for yeares by word, rendring Rent, the Leſſee entred into the Demeans allotted to the Wife of the Leſſor. The Husband dyed, and the Wife brought an Action of Waſt. Anderſon, By the partition the Demeans are now become in groſſe, and ſevered from the Mannor; And if partition be made of a Mannor, ſo as the Demeanſes be allotted to one Siſter, and the Services to the other, now the Mannor is diſſolved, yet if the other Siſter dyeth without iſſue, and her part deſcendeth to the other, now it is become a Mannor againe, which Windham and Periam granted, See 12. H. 4. 271. And Anderſon was of opinion, that the moyety of the Demeans did not paſſe by the words of the moyety of the Mannor, as if one ſeiſed of a Mannor maketh a Feoffment in Fee of part of the Demeans, and afterwards re-purchaſeth them, and then makes a Feoffment of the whole Mannor, and Demeans re-purchaſed, will not paſſe thereby, for they were once ſevered from the Mannor, and not re-united by the purchaſe. Periam, Although that in truth it is not a Mannor nor any part of a Mannor, yet if it hath been reputed, the moyety of the Mannor, it ſhall paſſe by ſuch name, which Anderſon granted, but it is not like to our Caſe. Periam, This is an ancient partition, as appeareth by the Verdict, ten yeares paſt, and alſo it hath been reputed the moyety of the Mannor, therefore it ſhall paſſe, Windham conceſſit, Periam, The intent of the Grantor is the beſt Interpretor of theſe words, without relying ſtrictly upon the words. Anderſon, If we ſhall take the intents of men for Law, we ſhall fal into many confuſions in our proceedings, but the Law is to judge of the meanings of men by their words, ever in the conſtructions of Wills, the intent of the Teſtators have not had further favour then the words have given leave. As to the other point: It was argued by Walmſley, that the Leaſe made by the Husband and Wife without Deed was void, See 1. Ma. Dyer 91. And if the Wife after the death of her Husband accepts the Rent upon ſuch a Leaſe reſerved, it ſhall not bind her, for the conſent of the Wife ought to be at the beginning of it, which cannot be without Deed: Anderſon conceived that the ſenſe is not meerly void, See 15. Eliz. Smith & Stapletons Caſe, Plowd. 431. Periam, The matter is clear, for although the Plaintiff declares generally of a Leaſe made by the Husband and Wife, yet the Jury hath found, that it was by Indenture, and that is purſuant enough. And if the Husband and wife make a Feoffment of the wives Land, it is the Feoffment of both of them; which Walmeſley granted: It was adjorned.

Partition.

Trinit.

Trinit. 31. *Eliz.* in the Common Pleas.

CCLXXXIV. Smallwood *and others, againſt the Biſhop of* Lichfeild *and others,* Quare Impedit.

Quare Impedit.

HUmphrey Smalwood, Richard Say, and Thomas Say, Executors of William Say, brought a Quare Impedit againſt the Biſhop of Coventry and Lichfeild, and M Incumbent, quod permittat præſentare ad Archidiaconatum de Derby, which was void, Et ad preſentationem Teſtatoris in vita ſua, & nunc in retardationem executionis Teſtamenti, did belong to the Executors: Exception was taken becauſe theſe words (In retardationem executionis Teſtamenti) could not be applyed to a diſturbance in the life of the Teſtator. Windham, There is not any Writ in the Regiſter of Quare Impedit, upon a diſturbance made to the Teſtator. Anderſon, What then? therefore no remedy becauſe no Writ according to his ſpeciall matter, 25 E. 3. 25. Goods are taken out of the poſſeſſion of the Teſtator, upon which the Executors brought Treſpaſſe, In retardationem executionis Teſtamenti, the Writ abated, for it ought to be where the Executors themſelves were poſſeſſed: Periam, The Advowſon it ſelfe is valuable, not the preſentment, therefore it cannot be ſaid in retardationem; Periam, Before the Statute of 4 E. 3. 73. In Caſe where damages were only to be recovered, the Action, moritur cum perſona, but where the thing it ſelfe was to be recovered, there the Action accrued to the Executors: Anderſon, 7 H. 4. 73. Ejectione firmæ, of an Ejectment made unto the Teſtator was maintained by the Executors by equity of the Statute of 4 E. 3. cap. 6. And by the opinion of the whole Court, the Executors might have a Quare Impedit upon a diſturbance made to the Preſentment: It was objected alſo, that a Quare Impedit doth not lye of an Archdeaconry-ſhip, for it is not locall, nor any Indenture made of it, but is only a matter of function, but it was not allowed, for an Archdeacon hath Locum in choro: And by the Statute a Quare Impedit lyeth of a Chappell, and by the equity of it, of a Prebend, &c. See the Statute of Weſt. 2. Quare Impedit of a Chappell, Prebend, &c. It was moved, if the Executors had preſented after the death of the Teſtator, whether the Archdeacon ought to receive the Clark of the Teſtator, or of the Executors, and the opinion of the Court was, That the Biſhop ſhould have election therein: And afterwards Judgement was given, that the Writ ſhould abate, for the diſturbance to the Teſtator cannot be ſuppoſed new matter (In retardationem executionis Teſtamenti) But yet it was agreed, that the Executors might have their ſpeciall Writ upon their Caſe for the ſaid diſturbance.

CCLXXXV. *Trin.* 31 *Eliz.* In the common Pleas.

IN an Action brought againſt one as Executor, who pleaded that he refuſed, upon which the parties were at Iſſue: The Biſhop did certifie, quod non recuſavit, where as in truth he had refuſed before the Commiſſary: Fenner Serjeant moved, to have the adviſe of the Court upon that matter, and argued that the Court ought to write to the Commiſſary: Which was denyed by the whole Court, for he is not the Officer unto the Court to that purpoſe, but the Biſhop himſelfe is the Officer: And the party cannot aver againſt the certificate of the Biſhop, no more then againſt the Returne of the Sheriff: And the Court was alſo of opinion, that the only remedy for the Defendant was by Action upon the Caſe againſt the Biſhop for his falſe Certificate: But it was moved, That the Iſſue joyned upon the refuſall ought to be tryed

ed by Jury, and not by the Certificate of the Bishop, and so was the opinion of Windham and Walmesley. Periam, Where the Issue is whether the Executor did refuse before such a day, or after, there the tryall shall be by Jury, contrary where the Issue is upon refusall generally, because the refusall is before him as a Judge, as also is Resignation.

Mich. 31. *Eliz.* in the Common Pleas.

CCLXXXVII. Sutton, *and* Holloway *and* Dickons *Case.*

IN an Ejectione firmæ by Richard Sutton against Robert Holloway, and Thomas Dickons, upon not guilty pleaded, the Jury found this speciall matter, scil. That the said Thomas Dickins had not any thing in the Lands in question at the time of the making of the Lease, upon which the Action is brought, scil. Who leased by Indenture to the Plaintiff for certain years, who entred, and afterwards the said Thomas Dickins, contra Indenturam suam prædictam intravit upon the Plaintiff, and, If the same should be a good Lease by Estoppell was the question; the Jury having found the truth of the matter, scil. That the Lessor had not any thing at the time of the demise; Walmesley objected, That the Jury ought not to find the Indenture, because it was not pleaded, for the Plaintiff doth not declare upon any Indenture, but the Exception was not allowed, but in old time the Law was such, 22 E. 3. but at this day the Law is otherwise, See Scholastra's Case, 14. Eliz. Plowd. 411. But where a Release or other writing ought to be pleaded, there it ought to be shewed to the Court. Walmesley, In rei veritate, the Lease is void, for a man cannot let Land in which he hath not any thing: but in respect of the parties themselves, the Lessors and Lessee both are concluded to say, That is no Lease, for none of them can say the contrary: But here the Jury which is a third person, is not estopped to say the truth, but they may find the speciall matter and the truth of the Case, and the Estoppell hath not place there, but, the truth of the matter appearing to the Judges, the Judges ought to adjudge upon the same, scil. If a man may make an effectual lease of Lands, in which he hath not any thing. At another day it was moved by Shutl. Although that the Jury be not estopped, yet the parties themselves are estopped, for the Law makes the Estoppell betwixt the parties, and the Law will not permit a man to say any thing against his own Deed being indented, nor any matter contained in it, Periam and Anderson clearly for the Plaintiff, That it is a Lease by Estoppell and by Periam, It hath been adjudged in the Kings Bench, That the Jury in such case are compellable upon paine of Attaint to finde the Estoppell: Walmesley, Here the Estoppell is out of Doors, for the truth of the matter disclosed by the Verdict, not by the parties only maketh the Estoppell, and he much relyed upon the case of Littleton, 149. a. A woman; seised of Lands in Fee, taketh a Husband, who alieneth to another in Fee, the Alienee leaseth to the Husband and Wife for their lives, now the Wife is remitted, and seised in Fee as before, here if the Alienee, i. e. the Lessor, brings an Action of Waste against the Husband and Wife, the Husband cannot bar the Plaintiff by the truth of the matter; scil. the Remitter of his wife; for he is estopped to say against his own Feoffment, and his re-taking of the particular estate to himselfe and his Wife.: But if in an Action of Waste, the Husband make default at the Grand Distresse, and the Wife prayeth to be received, shee may well shew the whole matter: So here the Jury: Windham, The Plaintiff ought to have demurred upon the Evidence: Periam, What if the Defendant will not joyne with the Plaintiff in the Demurrer? Windham, there the Court ought to over-rule them, and if the

Estoppell.

the parties had demurred upon the Evidence, we should have adjudged upon that Evidence, that a man cannot lease lands in which he hath not any thing: And here, the Estoppell could not be pleaded, for the Defendant hath pleaded the generall Issue, but if he had pleaded Non demisit, then the Estoppell should have holden place.

Pasch. 31. *Eliz.* in the Common Pleas.

CCLXXXVII. Milles *and* Snowballs *Case.*

A Juror did surmise at the Bar, that he was a Tenant in Ancient demesne, and had his Charter in his hand, and prayed to be exempted from the Jury and discharged, but the Court did not regard it, but caused him to be sworne. And Windham said, that he might have his remedy against the Sheriff, and Nelson Preignothory said, if he had made default and lost Issues, he might shew his Charter in the Exchequer upon the Amercement estreated, and there he should be discharged: In that Case, it was holden by the Court, That if a Feoffment be made of a House, and the Deed be delivered in the House without other circumstance, the same doth not amount to a Livery of seisin, but if he doe any act by which the intent of the Feoffor appeareth, that the Feoffee should have Livery and Seisin; as if the parties goe of purpose to the place intended to passe, to the intent that the Deed may be delivered in that kind, the same doth amount to a Livery, by Anderson, and the whole Court. Priviledge of Exemption from Jurics. Livery of seisin.

Mich. 32. and 33. *Eliz.* In Communi Banco.

CCLXXXVIII. Bradstocks *Case.*

RObert Bradstock seised in Fee of certain Lands, made a Feoffment in Fee to the use of himselfe in tail, and for want of such Issue to the use of John Bradstock his Brother in tail, and for want of such Issue to the use of Henry Bradstock, another Brother in tail, Provided alwayes, That if the said John or Henry doe goe about to avoid any estate or demise by copy, made or to be made of the Premisses, or any part thereof, that then his estate should cease. Robert dyed without Issue, John entred and levyed a Fine, Sur conusans de droit come ceo, &c. of the Land: And the opinion of the whole Court was, That this Fine was not any offence against the said Proviso, for these words (made or to be made) doe not extend to estates made or limited by the said Feoffment, but only to estates before made, and to be made after wards. Estates. Conditions.

Mich. 32 & 33 *Eliz.* In Communi Banco.

CCLXXXIX. Long *and* Hemmings *Case.*

IN a Quare Impedit by Long against Hemming and the Bishop of Glocester, of the Church of Frombillet, upon the pleading the Issue was, If Thomas Long Father of the Plaintiff did enfeoff the Plaintiff of the Manor of Frombillet, to which the Advowson of the said church was appendant before he granted the Advowson to one Strengtham who granted it to the Defendant, or not. And the Jury gave a speciall Verdict, scil. That the Abbot of S was seised of a capitall Messuage in Frombillet, and of one hundred Acres Quare Impedit.

Acres of Land there, And that there was a Tenancy holden of the said capitall Messuage by such Services, and that the said capitall Messuage had been known time out of mind, by the name of the Mannor of Frombillet, and that the Advowson was appendant to it, and conveyed the said capitall Messuage and Advowson to the King by the dissolution, and from the King, to the said Thomas Long, who so seised, without any Deed did enfeoff the Plaintiff of the said Mannor, and made Livery and Seisin upon the Demesnes, And that the said Thomas Long by his Deed made a grant of the said Advowson, to the said Strengtham, and afterwards the Free-holder attorned to the Plaintiff: And by the clear opinion of the whole court, here is a sufficient Mannor to which an Advowson may be well appendant, and that in Law, the Advowson is appendant to all the Mannor, but most properly to the Demesnes, out of which at the commencement it was derived, and therefore by the attornement afterwards, within construction of of the Law, shall have relation to the Livery, the Advowson did passe included in the Livery: And the grant of the advowson made mesne between the Livery, and the attornement was void, and afterwards Judgment was given, and a Writ to the Bishop, granted for the Plaintiff.

CCLXXXX. *Mich.* 32 & 33 *Eliz.* In Communi Banco.

Debt.

A Made a Bill of Debt against B for the payment of twenty pounds at four dayes, scil. five pounds at every of the said four dayes, and in the end of the Deed, covenanted and granted with B, his Executors and Administrators, that if he make default in the payment of any of the said payments, that then he will pay the residue that then shall be unpaid, and afterwards A failes in the first payment, and before the second day B brought an action of Debt for the whole twenty pounds, It was moved by Puckering Serjeant, That the Action of Debt did not lye before the last day encurred; And also if B will sue A before the last day, that it ought to be by way of covenant, not by Debt: But by the whole Court, the action doth well lye for the manner, for if one covenant to pay me one hundred pounds at such a day, an action of Debt lyeth, a fortiori, when the words of the Deed are covenant and grant, for the word covenant sometimes sounds in covenant, sometimes in contract, solum subjectum materii.

Mich. 32 & 23 *Eliz.* In Communi Banco:

CCLXXXXI. Lancasters *Case.*

AN Information was against Lancaster for buying of pretended Rights and Titles upon the Statute of 32 H. 8. And upon not guilty pleaded, It was found for the Plaintiff, and it was moved in arrest of Judgment, because the Informer had not pursued the Statute, in this, that it is not set forth, that the Defendant nor any of his Ancestors, or any by whom he claimed, have taken the profits, &c. and the same was holden a good, and materiall Exception by the Court: and although it be layed in the Information, that the Plaintiff himself hath been in possession of the Land by twenty years before the buying of the pretended Title, for that is but matter of argument, and not any expresse allegation, for in all penall Statutes the Plaintiff ought to pursue the very words of the Statute, and therefore by Anderson, It hath been adjudged by the Judges of both Benches, that if an Information be exhibited upon the Statute of Usury, by which the Defendant is charged for the taking of twenty pounds for the Loane and forbearing of one hundred pounds for a yeare, there the Information is not good, if it be not alleadged in

in it, that the said twenty pounds was received by any corrupt or deceitfull way or means: And in the principall Case, for the Cause aforesaid, Judgment was arrested.

Mich: 32, & 33 *Eliz*: in the Common Bench.

CCLXXXXII. Bagshaw *and the Earl of* Shrewsburies *Case*.

Annuity.

BAgshaw brought a Writ of Annuity against the Earle of Shrewsbury, for the arrerages of an Annuity of twenty Marks per annum, granted by the Defendant to the Plaintiff, Pro Consilio impenso & impendendo, The Defendant pleaded, that before any arrerages incurred, he required the Plaintiff to do him Service, and he refused, The Plaintiff by replication said, that before the refusall, such a day and place the Defendant died, discharged the Plaintiff of his Service, &c. And the opinion of the Court was, that the Plea in Bar was not good, for he ought to have shewed for what manner of Service to doe, the Plaintiff was so retained, and for what kind of Service the Annuity was granted: and then to have shewed specially what Service he required of the Plaintiff, and what Service the Plaintiff refused. Another matter was moved, If the discharge shall be peremptory, and an absolute discharge of the Service of the Plaintiff, and of his attendance, so that as afterwards the Defendant cannot require Service of the Plaintiff. And by Walmesly Justice, it is a peremptory discharge of the Service, for otherwise how can he be retained with another Master: and so he should be out of every Service. Windham contrary, For here the Plaintiff hath an annuity for his life, and therefore it is reason that he continue his Service for his life, as long as the annuity doth continue, if he be required: But where one is retained but for one or two yeares, then once discharged, is peremptory and absolute.

Mich. 31. and 32. *Eliz* in the Common Bench.

CCLXXXXIII. Matheson *and* Trots *Case*.

BEtwixt Matheson and Trot the Case was, Sir Anthony Denny seised of certain Lands in and about the Town of Hertford, holden in Socage, and of divers Mannors, Lands, and Tenements in other places holden in chief by Knights-service, and having Issue two Sons, Henry and Edward, by his last Will in writing, devised the Lands holden in Hertford to Edward Denny his younger Son in Fee, and died seised of all the Premisses, Henry being then within age: After Office was found without any mention of the said Devise, the Queen seised the body of the Heire, and the possession of all the Lands whereof the said Sir Anthony died seised, and leased the same to a stranger, during the Minority of the Heire: by force and colour of which Lease the Lessee entred into all the Premisses, and did enjoy them according to the Demise. And the Heire at his full age sued Livery of the whole, and before any entry of the said Edward in the Land to him devised, or any entry made by the said Henry, the said Henry at London, leased the said Lands by Deed indented to I. S. for years, rendring Rent, by colour of which the said I. S. entred, and payd the Rent diverse years to the said Henry: And afterwards by casualty the said Henry walked over the Grounds demised by him, in the company of the said I. S. without any speciall entry or claim there made, I. S. assigned his Interest to I. D. who entred in the Premisses, and payd the Rent to the sayd Henry, who died, and afterwards the Rent was payd to the Son and Heire of Henry: And after four and twenty years after Devises.

Diſcent, where takes away entrie.

the death of the ſaid Sir Anthony, the ſaid Edward entred into the Land to him deviſed by the ſaid Deviſe; and leaſed the ſame to the Plaintiff, &c. And it was moved here, if this dying ſeiſed of Henry of the Lands in Hertford, and diſcent to his Heire, ſhould take away the Entry of Edward the Deviſee. And by Anderſon cleerly, If here upon the whole matter be a diſcent in the Caſe, then the Entry of Edward the Deviſee is taken away, although that the Deviſee at the time of the diſcent had not any Action or other remedy, for it ſhall be accounted his folly that hee would not enter, and prevent the diſcent. But VVindham, Periam, and VValmeſly Juſtices, were of a contrary opinion, For a Deviſee by a Deviſe hath but a Title of Entry, which ſhall not be bound by any Diſcent, as Entry for Mortmain, for Condition broken. And after long deliberation they all agree, that there was not any Diſcent in the Caſe, for by the Deviſe, and the death of the Deviſor, the Frank-tenant in Law, and the Fee was veſted in the Deviſee Edward: And then when the Queen ſeiſed, and leaſed the ſame during the Nonage of Henry, and the Leſſee entred, he did wrong to Edward, and by his Entry had gained a tortious Eſtate in fee, although he could not be ſaid properly a Diſſeiſor, nor an Abator: And afterwards when Henry after his full age, when by his Indenture he leaſed without any ſpeciall Entry, ut ſupra, and by colour thereof the Leſſee entred, now he is a wrong Doer to Edward the Deviſee and by his Entry had gained a wrongfull Poſſeſſion in Fee: and then the paying of the Rent to Henry, nor the walking of Henry upon the Land without any ſpeciall claim, did not gain any Seiſin to him: and ſo he was never ſeiſed of the Land, and could never dye ſeiſed, and then no Diſcent; and then the Entry of Edward was lawfull, and the Leaſe by him made to the Plaintiff was good: And ſo Judgment was given for the Plaintiff.

Mich. 32, & 33 *Eliz.* in the Common Bench.

CCLXXXXIV. Greenwood *and* Weldens *Caſe.*

Replevin.

IN a Replevin between Greenwood and Welden; The Defendant made Conuſans as Bayliff to John Cornwallis, and ſhewed how that ſeven acres of Land called Pilles, is locus in quo: and at the time of the taking were holden of the ſaid Cornwallis by certain Rent, and other Services: And for Rent arreare he made Conuſans, as Bayliff to Cornwallis. The Plaintiff pleaded out of the Fee of Cornwallis, upon which they were at Iſſue: And it was found that the Plaintiff is ſeiſed of ſeven acres called Pilles, holden of Cornwallis, ut ſupra: But the Jury ſay, That locus in quo doth contain two acres, which is called Pilles, and theſe two acres are, and then were, holden of Agmondeſham of the Middle-Temple: And if upon the whole matter, videbitur Curiæ, &c. And by the opinion of the whole Court, out of his Fee upon that matter is not found, for although it be found, that the two acres be holden of Agmondeſh. yet it may be that they are within the Fee of Cornwallis, for it may be that Cornwallis is Lord Paramount, and Agmondeſham Meſne, and then within the Fee of Cornwallis: And therefore for the incertainty of the Verdict, a Venire facias de novo was awarded.

Mich. 32. & 33. *Eliz.* in the Common Bench.

CCLXXXXV. Biſhop *and* Harecourts *Caſe.*

Aſſumpſit.

IN an Action upon the Caſe, The Plaintiff declared, that the 5. Junii, 30 Eliz. the Defendant (in conſideration that the Plaintiff the ſame day and year, ſold and delivered to the Defendant a Horſe) did promiſe to pay the Plaintiff

Plaintiff a hundred pounds in Trinity Term then next ensuing, and shewed that the Term began 7 Junii after: And upon Non assumpsit pleaded, it was found for the Plaintiff. And it was moved in arrest of Judgment, That it appeareth upon the Declaration, that the Plaintiff hath not cause of Action, for the Trinity Term intended is not yet come, for the day of the Assumpsit is the fifth of June, and the fourth day was the first day of the said Term, scil. the day of Essoines, and the seventh day 4. die post, and then the promise being made at the day aforesaid, after the Commencement of the said Term, the same is not the Term intended, but the Plaintiff must expect the performance of the promise untill a year after: And of that opinion was Anderson, but the three other Justices were strongly against him to the contrary, for by common intendment amongst the people, the Term shall not begin untill 4. die post, and so it is set down usually in the Almanack; And afterwards Judgment was given for the Plaintiff.

CCLXXXXVI. *Mich.* 32. & 33. *Eliz.* in the Common Bench.

COoper Serjeant came to the Bar, and shewed that A. Tenant in tail, the Remainder over to B. in Fee. A. for a great summ of money sold the Land to I.S. and his Heires, and for assurance, made a Feoffment in Fee, and levied a Fine to the said I.S. to the use of the said I. S. and his Heires: And note, that by the Indenture of Bargain and Sale, A. covenanted to make such further Assurance within seven daies, as the said I.S. or his Heires, or their Councell should devise: And shewed, that before any further assurance was made, the said I.S. died, his Son and Heire being within age: And now by advise of Councell; and of the Friends of the Infant, it was devised that for such further assurance and cutting off the Remainder, a common Recovery should be suffered, in which the said Infant should be Tenant to the Præcipe, and should vouch the Vendor, and because that the said Term of seven yeares is almost expired, and that the said Recovery is intended to be unto the use of the said Infant and his Heires, it was prayed that such a Recovery might be received and allowed. And two Presidents in such Case were shewed in the time of this Queen: one the Case of the Earl of Shrewsbury, and the other one Wisemans Case: But the Justices were very doubtfull what to do; But at last upon good assurance of people of good Credit, that it was unto the use of the Infant, and upon the appearance of a good and sufficient Guardian for the Infant in the Recovery, who was of ability to answer to the Infant if he should be deceived in the passing of that Recovery; and upon consideration had of the two Presidents, and upon Affidavit made by two Witnesses, that the said intended Recovery was to the use of the Infant, the Recovery was received, and allowed.

Common Recovery suffered by an Infant by his Guardian.

Mich. 32, & 33 *Eliz.* in the Common Bench.

CCLXXXXVII. Cottons *Case.*

IT was found by speciall Verdict, that Berwich and Tesdall seised of certain Lands, conveyed the same to Sir Thomas Cotton for life, the Remainder to William Cotton, & primogenito filio suo, & hæredi masculo & sic de primogenito ad primogenitum dict. William the Remainder to the right Heirs of the body of Sir Tho. Cotton, and William Cotton lawfully issuing, the Remainder to the right Heires of Sir Thomas Cotton: William had Issue a Son borne here in England, and went beyond the Sea to Antwerp, and there continuing, and his Son being within age in England, Sir Thomas Cotton

Fines levied to uses.

levied a Fine of all the Land, sur conusans de droit come ceo, &c. And afterwards by Indenture covenanted to stand seised to the use of himself for life, and afterwards to the use of Robert Cotton his Son in Fee: William died at Antwerp, his said Son being within age in England, Sir Tho. Cotton died, Robert entred, and leased the Lands for yeares to Sary, and the Infant Son and Heire of William leased the Land to one Chewne at Will, who entred and ousted Sary, who thereupon brought Ejectione firmæ. It was here holden by the Court, that Sir Thomas Cotton was Tenant for life, the Remainder to William for term of his life, the Remainder to the Heires of both their bodies issuing: So as unto one Moyety Sir Thomas Cotton had an Estate-tail dependant upon the said Estates for life; and so the Fine levied by him was a Bar to the Issue of William for a Moyety. And as to the other Moyety they held that the said Fine was not any Bar, but that the party interessed at the time might avoid the Fine at any time during his Nonage, and five yeares after, for William his Father was not bound by the Statute of 4 H.7. because at the time of the Fine levied, he was beyond the Seas, and although he never returned but died there, yet by the equity of the Statute his Issue shall have five yeares after his death to avoid the Fine, if he were of full age, and if he were within age, then during his Nonage, and five yeares after. At another day the Case was argued and put in this manner, viz. Lands were given to Sir Thomas Cotton for life, without Impeachment of Waste, the Remainder over to Cheny Cotton his eldest Son, & primogenito filio & hæredi Mascato, of the said Cheney. & sic de primogenito filio in primogenitum filium, the Remainder to the Heires Males of the body of the said Cheney, and for want of such Issue, the Remainder to William Cotton his second Son, & primogenito filio, in primogenitum filium, the Remainder over to the said Sir Thomas, and the said William, and the Heires Males of their bodies lawfully begotten. Cheny Cotton died without Issue, VVilliam having Issue, went beyond the Sea, Sir Thomas Cotton, 19 Eliz. levied a Fine with Proclamation, and afterwards VVilliam the Father died in Antwerp, his Son being within age, Sir Thomas by Indenture limited the use of the Fine to himselfe for life, the Remainder over to Robert Cotton his third Son in Taile, Sir Thomas died (but it doth not appear at what time) VVilliam the Son being yet within age entred (but non constat quando) and 31 Eliz leased the Lands to the Defendant at Will. Drue Serjeant argued for VVilliam Cotton, And he conceived, that VVilliam the Father had an Estate-tail, and then the entry of VVilliam the Son was congeable for the whole: But admitting that it is not an Estate-tail in VVilliam the Father for the whole, yet he hath by the second Remainder an Estate tail in the Moyety, and then his Entry good as to one Moyety; and then Robert being Tenant in Common of the other Moyety, his Lessee without an actuall Ouster cannot maintain an Ejectione firmæ against the Lessee of his Companion. And he conceived here is a good Estate-tail in VVilliam Cotton by virtue of the Limitation to VVilliam, & progenito filio & hæredi Mascato ipsius Guliel. & sic de primogenito filio in primogenitum filium, &c. for according to the Statute of VVest. 2. the will of the Donor ought to be observed, and here it appeareth that the intent of the Donor was to create an Estate-tail, although the words of the Limitation do not amount to so much. And the Estates mentioned in the Statute aforesaid, are not Rules for Entailes, but onely Examples, as it is said by Trew, 33 E. 3. F. Tail 5. and see Robeiges Case, 2 E. 2. 1 Fitz. Tail: and 5 H. 5 6. Land given to A. and B. uxori ejus, & hæredibus eorum & aliis hæredibus dicti A. si dict. hæredes de dictis A. & B. exeuntes obierint sine hæredibus de se, &c. and that was holden a good Entail; so a gift to one and his Heires, si hæredes de carne sua habuerit & si nullos de carne sua habuerit revertatur terra, and adjudged a good tail: So 39 E. 3. 20. Land given to Husband and Wife, & uni hæredi de

Estates.

Tailes.

de corpore suo ligitime procreat. & uni hæredi ipsius hæredis tantum, And that was holden a good Taile; and so he conceived in this Case, that although the words of the Limitation are not apt to create an Estate-tail according to the phrase and stile of the said Statute of West. 2. yet here the intent of the Donor appears to continue the Land in his Name and blood, for William the Son could not take with his Father by his Limitation, for he was not in rerum natura, and therefore all shall vest in William the Father, which ses 18 E. 3 Fitz. Feoffments & Fait. 60. Now it is to see, if upon the Limitation to Sir Chomas Cotton and William his Son, by which the Remainder is limited to Sir Thomas Cotton and William, and the Heires Males of their bodyes issuing, the said Sir Thomas Cotton and William have a joynt Estate-taile; in respect that the Issue of the body of the Son, may be Heire of the body of the Father: and so because they might have one Heire which shall be inheritable to his Land, it shall be one entire Estate-taile in them: But he conceived that they are severall Estate-tailes, and that they are Tenants in Common of an Estate-taile, 3, & 4 Phil. & Mar. Dyer 145. Land given to the Father and Son, and to the Heires of their two bodies begotten, the Remainder over in Fee, the Father dieth without other Issue, then the Son only, and afterwards the Son dieth without Issue, a stranger abates: Or if the Son hath made a Discontinuance, if he in the Remainder shall have but one or two severall Formedons was the Question. And by Saunders, Brook, and Brown, but one Formedon, and Quære left of it; yet admitting that, yet notwithstanding that, it might be that they had severall Estate-tailes, 17 E. 3. 51. 78. Land given to a man and his Sister, and to the Heires of their two bodies issuing, they have severall Estate-tailes, and yet one Formedon. And see 7 H. 4. 85. Land given to a man and his Mother, or to her Daughter in Taile, here are severall Entailes. And here in the principall Case, Sir Thomas Cotton hath one Moyety in Taile erpectant upon his Estate for life: and therefore as to the Moyety of Sir Thomas Cotton he is bound by the Fine. And the other Moyety is left in the Son, who may enter for a Forfeiture upon the alienation made by his Father, as well in the life of the Father, as afterwards. Now after this Fine levied, the entry of William the Son by virtue of his Remainder is lawfull after the death of Sir Thomas, although that VVilliam the Father was beyond the Sea at the time of the Fine levied, and there afterwards died, VVilliam the Son being within age. The words of the Statute of 4 H. 7. are, Other then Women Covert, or out of this Realm, &c. so that they or their Heires make their Entry, &c. within five yeares after they return into this Land, &c. So that by the bare letter of the Act, VVill. the Son hath not remedy, nor release by this Act against the Fine, because that VVilliam the Father died beyond the Sea, without any return into England, yet by the Equity of the Statute he shall have five yeares to make his Claim, although his Father never return, for if such literall construction should be allowed, it should be a great mischief, and it should be a hard Exposition, for this Statute ought to be taken by Equity, as it appeareth by diverse Cases, 19 H. 8. 6. My Uncle doth disseise my Father, and afterwards levies a Fine with proclamations: my Father dieth, and after within five yeares my Uncle dies, that Fine is no Bar to me, yet the Exception doth not help me, for I am Heire to him that levied the Fine, and so privy to it, but my Title to the Land, is not as Heire to my Uncle but to my Father: So if an Infant after such a Fine levied, dieth before his full age, his Heir may enter within five yeares after, and yet that Case is out of the Letter of the Statute. And by Brown and Sanders, If the Disseisee dieth, his Wife enfient with a Son, the Disseisor levieth a Fine, the Son is born, although this Son is not excepted expresly by the words, because not in rerum natura at the time of the Fine levied &c. yet such an Infant is within the equity and meaning of the said Statute. See the Case betwixt Stowel and Zouch, Plow. Com.

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366. And by him, It was holden, 6. Eliz. that an Infant brought a Formdon within age, and adjudged maintainable, although the words of the Statute be, That they shall take their Actions or lawfull Entries within five years after they come of full age: And he also argued, that here, when Sir Thomas being Tenant for life, levyed a Fine, which is a Forfeiture, he in the Remainder is to have five years after the Fine levyed, in respect of the present forfeiture, and also five years after the death of the Tenant for life: And that was the case of one Some adjudged accordingly in the Common Pleas: It hath been objected on the other side, That the Defendant entring by color of the Lease at Will made to him by William who was an Infant, that he was a Disseisor as well to the Infant as to the Lessor of the Plaintiff, who had the moyety as Tenant in common with the Infant, and then when the Lessor of the Plaintiff entred upon the Defendant, and leased to the Plaintiff, and the Defendant entred and ejected the Plaintiff, he is a Disseisor; to which he answered, That the Defendant when he entred by the Lease at Will, he was no Disseisor, for such a Lease of an Infant is not void, but only voidable, &c. and then a sufficient Lease against the Plaintiff, although not against the Infant. Beaumont Serjeant, to the contrary; By this manner of gift, William the Son took nothing, but the estate setled only in William the Father, but not an estate taile, by the words, hæredi masculo, &c. And voluntas Donatoris, without sufficient words cannot create an estate tail, but where the intent of the Donor is not according to the Law; The Law shall not be construed according to his intent, but his intent shall be taken according to the Laws; And he held that Sir Thomas and William had severall estates in tail, and severall moyeties, and not one entire estate, and here, upon all the matter, Sir Thomas is Tenant for life of the whole, the Remainder of one moyety to him in tail, the Remainder of the other moyety unto William in tail, and, rebus sic stantibus, Sir Thomas levying a Fine of the whole, now as to one moyety which the Conusor had in tail, the Fine is clearly good, and so as to that, Robert the Lessor of the Plaintiff hath a good tytle, as to the said moyety, and as to the other moyety he conceived also, that William is bound, for this Statute shall not be construed by Equity, but shall binde all who are expressly excepted, and that is not William the Son, for his Father never returned, and then his Heire is not relieved by the statute; Also William had a Right of Entry at the time of the Fine levyed, scil. for the Forfeiture, and because he hath surceased the time, for the said Right of Entry, he shall not have now five years after the death of Tenant for life, for he is the same person, and the second; saving which provides for future Rights, extends to other persons then those who are intended in the first saving, and he who may take advantage of the first saving, cannot be relieved by the second saving, for no new title doth accrue to him in the Reversion or Remainder, by the death of Tenant for life, for that title accrued to him by the forfeiture, so as the title which he hath by the death of the Tenant for life, is not the title which first accrued unto him: Also by this Forfeiture, the estate for life is determined as if Tenant for life had been dead; for if Tenant for life maketh a Feoffment in Fee, the Lessor may have a Writ of Entry, ad terminum qui præterijt. Fitz. 201. which proves, that by the Forfeiture the estate is determined, and then no new title doth accrue to him in the Remainder, by the death of the Tenant for life, but that only which he had before the alienation, so that his non-claime after the five years shall bind him, Then, when William the Infant having a Right to a moyety, and Robert the Lessor of the Plaintiff a Right to the other moyety, and the Infant leaseth unto the Defendant at Will, who entreth, now is he a Disseisor as well to Robert as to the Infant: Then if the Defendant be Disseisor and hath no title by the Infant, Robert who hath Right in a moyety may well enter into the whole, for he hath the possession

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per my & per tout by his Entry, and then when the Defendant doth eject him, he hath good cause of Action. And after at another day the Case was moved, and it was agreed, That for one moyety the Infant is bound, for Sir Thomas had an estate tail in a moyety, for he was Issue of the body of the Conusor, but for the other moyety, the Fine levyed by Tenant for life, William the Father being then Tenant beyond the Sea, It was holden by Anderson, Windham, and Walmesley, that the Infant was not barred, notwithstanding the objection abovesaid, That William the Father never returned into England, and notwithstanding the words of the Statute of 4 H. 7. And by Walmesley, If an infant make his claime within age it is sufficient to avoid the Fine, and yet the said Statute seems to appoint to him time within five yeares after his full age, so that according to the very words, a claime made before or after should be vain, yet in Equity, although he be not compellable to make his claime untill the time allowed by the Statute, yet if he make it before, it is good enough. And by Anderson, Although that William the Father did not returne, yet if he makes not his claime within four years after the death of his Father being of full age, and without any impediment, &c. he shall be barred, If in such case a man hath many impediments, he is not compellable to make his claim when one of the impediments is removed, but when they are all removed. So if the Ancestor hath one of the said impediments, and dyeth before it be removed, and his Heire is within age, or hath other impediment, he is not bound to make his claime till five years after his impediment is removed. And Somes case cited before was holden and agreed to be good Law, for the Forfeiture may not be known unto him, And as to the objection against the Lease at Will, because it was made by an Infant, and no Rent reserved upon it, nor the Lease made upon the Land, and therefore the Lessee should be a Disseisor, To that it was answered, Be the Defendant a Disseisor, or not, it is not materiall here, for if the Plaintiff hath not title according to his Declaration, he cannnt recover, whether the Defendant hath title or not, for it is not like unto Trespasse where the very without other title is good, contrary in Actions against all who gave not title, but in Ejectione firmæ, if the title of the Plaintiff be not good and sufficient, be the title of the Defendant good or not, he shall not recover: And afterwards Judgment was given for the Defendant, Hill. 33. Eliz.

Mich. 32 *&* 33 *Eliz.* In Communi Banco.

CCLXXXVIII. Cheyney *and* Smiths *Case*.

IN an Ejectione firmæ by Cheyney and his Wife against Smith: The Plaintiffs declared upon a Lease made by the Master of the House or College of S. Thomas of Action in London to I S who assigned it over to Knevit, who by his Will devised the same to his Wife, who he made also his Executrix, and dyed, and afterwards shee took to Husband one Waters, and dyed; Waters took Letters of Administration of the Goods and Chattells of his Wife, and afterwards leased to the Plaintiffs: And upon not guilty they were at Issue. And it was given in Evidence, That the Lease given in Evidence, was not the Lease whereof the Plaintiffs had declared, for the originall Lease shewed in Court, is, Master of the House or Hospitall, where the Lease specified in the Declaration is, Master of the House or Colledge, 38. E. 3. 28. And some of the Justices conceived that there is not any materiall Variance (but if the parties would, it might be found by speciall Verdict) For by them Colledge and Hospitall are all one. And afterwards the Court moved the Plaintiffs to prove if the wife were in as Executrix, or as Legatee;

tee, for by Anderſon, and Periam, untill election be made he ſhall not be ſaid to have it as Legatee, eſpecially if it be not alleadged in fact, that all the debts of the Teſtator are paid, and Anderſon doubted, although that it be alleadged, that the debts be paid, If the Executor ſhall be ſaid to have the ſaid Leaſe, as a Legacy before ſhe hath made Election, vi. Weldens Caſe, and Paramonts Caſe in Plowd. And afterwards it was given in Evidence, That the wife after the death of the Husband had repaired the Bankes of the Land, and produced Witneſſes to prove it, as if the ſame ſhould amount to claime it as a Legacy, and the Court ſaid, that that matter ſhould be referred to the Jury: And it was further ſhewed in Evidence, that the ſaid Wife Executrix, and her ſaid Husband Waters formerly made a Leaſe by Deed, reciting thereby, that where the Husband was poſſeſſed in the right of his ſaid Wife as Executrix of her firſt Husband, &c. And by the opinion of the whole Court, the ſame was an expreſſe claime as Executrix; and then when the Wife dyed, if the Husband would have advantage of it, he ought to take Letters of Adminiſtration of the Goods of her firſt Husband, and not of the Wife, but if ſhee had claimed the Land and the Term in it as Legatee, and had not been in poſſeſſion, Adminiſtration taken of the Rights and Debts of the Wife, had been good as to that intent, that his Wife was not actually poſſeſſed of it, but only had a Right unto it, and of ſuch things in Action, the Husband might be Executor or Adminiſtrator to his Wife, but here they have failed of their title: The Adminiſtration being taken of the goods of the Wife, where it ſhould be of the Goods of the Teſtator the firſt Husband; And for this cauſe the Plaintiffs were non-ſuit, and the Jury diſcharged. And it was agreed by all the Juſtices, that if the Wife before Election had taken Husband, that the Husband might have made the Election in the Caſe aforeſaid.

Mich. 32. and 33. *Eliz.* In Communi Banco.

CCLXXXXIX. *The Lord* Cobham *and* Brownes *Caſe.*

THe Caſe between the Lord Cobham and Browne, was, that the Abbot of Grace was ſeiſed of the Manor of Graveſend in the County of Kent, which Manor doth extended to the Pariſhes of Graveſend, and Milton, and that the ſaid Abbot and all his Predeceſſors, &c. time out of minde, &c. have had a Water-Court within the ſaid Manor, which Court had been holden at Graveſend Bridge in the end of it, and that all the Inhabitants within the ſaid Pariſhes, which have Boates either entirely or joyntly with others, and have uſed to tranſport or carry paſſengers from Graveſend to London, & e contr. and have uſed to faſten their Boates at the ſaid Bridge of Graveſend, have uſed to do ſuit at the ſaid Court, and there have uſed to enquire of all miſ-orders, and miſ-demeanors of Water-men there, and that the ſaid Abbots, &c. have uſed to have the Fines and Amercements of the ſame Court, and conveyed the ſaid Manor to the Plaintiff, and that at a Court there holden, The Defendant being ſworne with the reſidue of the Enqueſt to enquire of ſuch diſ-orders, refuſed to give his Verdict, for which for the ſaid contempt, the Defendant, by the then Steward was amerced twenty ſhillings, for the which Amercement the Plaintiff brought an Action of Debt: It was moved by Beaumount Serjeant; That the Action did not lye, for the Preſcription upon which the Action is grounded is not good, firſt, he claimes to have this Court within his Manor, and as a thing appertaining to it, and yet he claimes ſuit at his Court of all the Inhabitants of the ſaid two Pariſhes, and to have them Suitors at it, being meer ſtrangers to the Manor, and which do not hold of it, for althongh it be alleadged, that the ſaid Manor doth extend

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in the said Parishes, yet the same doth not prove that every part of the said Parishes is within the said Mannor, and if it be not so, the Prescription may extend as well to all the County of Kent, as wel as to the said two Parishes, for such a Prescription cannot bind but those which are Tenants of the said Mannor, and cannot extend to strangers, which see 21 H 7. 40. The Case of Pound-breach. Secondly, it is not alleadged here, that the Steward ought and had used to assesse Amercements, for by the common Law no Steward hath authority to assesse Amercements or Fines in a Court Baron, for there the Suitors are Judges and not the Steward, and that this Water-Court is a Court Baron, it appeareth by the Declaration, for there it is said that it is a Court belonging to such a Mannor, and that prima facie shall be meant a Court Baron, if the contrary be not shewed, vi. Fitz. 75. g. Thirdly, it is not shewed that the Amercement was afferred, which see ib. 75. Harris Serjeant, to the contrary: This Court upon the whole matter is in the nature of a Leet, for the reformation of misorders between the Watermen; and the prescription here will warrant such a Court well enough, And there are many Courts in England which are not Court Barons, but grounded upon Prescription, 40 E. 3. 17. The Court before the Chancellor of Oxford, Prescription to have Swan mote, and it is reason that this Prescription should hold place, for here is quid pro quo, for the Watermen receive their carriage and loading at this Bridge, and also discharge their loading there, and they use to fasten their boates there, and therefore in liew of that benefit, it is reason that they be attendant at the Court which is upon the said Bridge, and upon that reason is the Prescription of Toll Traverse, 5 H. 7. 9. And to have a Land Bird, 2 R. 3. 15. And toll of every Vessell which passeth the River, 21 H. 7. 16. And this Court may be a Court within the Mannor, and yet no Court Baron, but in the nature of a Leet, and the Prescription shall be good in Law by reason of the recompence to the Suitors, and then, if it be not a Court Baron, but rather in the nature of a Leet, then it followes, that the Suitors are not Judges but the Steward, and it behoves not to prescribe for the Amercement, for that is incident to a Court Leet, for otherwise how can the Suitors be compelled to doe their suit at it, or their defaults, or contempts at the same be punished? and as to the afferring of the Amercement, it needs not here, for it is a Fine for the open contempt, and despite done unto the Court, and not an Amercement, and it may well be assessed by the Steward alone, vi. 23 H. 8. Br. Leet, 37. Drill Serjeant, to the contrary: For this Prescription is not reasonable, to drive strangers to doe suit at a Court Baron, for there is sufficient consideration in the Case of Tenants of the Mannor; for it may be at the beginning, the Tenancies were given upon such consideration to doe such suit: But in the principall case, the Prescription is their ground, and therefore unreasonable, because without consideration, 22 E. 4. 43, see the case there, and 21 H. 7. 20. A custome alleadged, that if any Tenant distraine the Beasts of another Damage Feasant, That he ought to bring such Beasts to the pound of the Lord of the Mannor; and if not, That at the next Court he should be amerced twelve pence, and the same was holden no good custome, because against common Right and common Law: Puckering Serjeant: If this Court shall be reputed in Law a Court Baron, then the Prescription, for the manner of it is not good, for in such case, the Amercement cannot be assessed by the Steward; But he held, that this court is in the nature of a Court Leet, and not a court Baron, and all Inhabitants within the Precinct of it, are bounden to doe their suit at it by reason of their Restancy, and their trade there, if they have Boates, or shares in Boates, and such court is for the better government of such Watermen, and the exercise and practise of their trade, and for the redressing of misdemeanors betwixt them, and so this court hath a reasonable commencement, being instituted for the publick good, and if customes which concerne the

prıvate benefit of any be allowable; as the Mayor and Burgesses of a Town prescribe to have of every Tun which cometh in any Ship into their Port, and put upon the Land 6 d. for Toll. See 21 H. 16. A fortiori, a Custome or Prescription which concerns the publick good, is good: & it is not strange that such Court hath been maintained by Prescription, for the Court of Stanneris is so without any commencement or errection, but by Custome. And although that of a thing Toll cannot be paid at any Market for things brought to Market, but for things sould, yet by custome Toll shall be paid for every thing brought to Market, and for the standing of the Seller there; for the sale of Victuals is for the good of the Common-wealth, which thing is the ground of the Prescription in the principall Case, and therefore the Prescription in the manner of it is good: and if the prescription be good for the Court, then to have a Steward to keep the Court, to assess Fines for contempts & disorders is good without any speciall prescription, for it is incident to it. Periam Justice, If it be a Court-baron then cannot the Steward impose or assesse any Fine: which Windham granted, but he conceived it is not a Court-baron, but a Court by prescription. Periam, If the Plaintiff claim it as belonging to his Mannor, it shall be intended a Court-baron, but yet a man may have a Court within his Mannor by prescription, which is not a Court-Baron. Anderson was of opinion that it is not a Court-baron, for although it be appertaining to the Mannor, yet that is not any proof that it is a Court-baron: For a Leet may be appertaining to a Mannor. It was adjourned.

Mich. 32 & 23 *Eliz.* In Communi Banco:

CCC. Green *and* Edwards *Case:*

BEtween Green and Edwards the Case was this, Land is demised to A. for nine yeares, if he shall so long live, and if he dye within the Term, that B. his Wife shall have it durante toto residuo termini prædict. The Husband dyeth during the Term: If the Wife shall have the residue of the Term was the Question. And by Periam and VValmesly Justices, by the death of the Husband the Term is determined, and thereupon nothing can remain, especially by way of grant. but by way of Devise it might be. See 9 Eliz. 253. A Lease for forty yeares to A. if he shall live so long, and if he dye within the Term, that E. his Wife shall have the residue of the yeares: Where it was holden, that by the death of A. the Term is determined, and then there is no residue, and so the Limitation is void, vide 3 & 4 Phil. & Mar. 150. Anderson, If the Husband and Wife had been parties to the Deed of Demise, then the residue of the Term should go to the Wife after the death of the Husband: and this word (Terminum) shall not be taken for the Interest which is given to the Husband, but for the time, so it is as much as to say, that if the Husband dye before the forty years expired, that then his Wife shall have the residue for forty years; and it is reason to make such construction rather then to construe the said part of the Deed to be void: For if in the construction of this Grant, the Term shall be taken for the Interest, then the Limitation shall be void. And in all Grants, the Deeds shall be taken most beneficially for the Grantee, and most strongly against the Grantor, especially ut res magis valeat quam pereat; And here are severall Grants and severall Termes: But if such matter be limited to the Wife not named in the Deed, all is void, for it is incertain when the Term shall begin, and it cannot vest during the particular Estate, and it is not certain, whether the Husband shall survive the Term, or not. And by VValmesly and Windham the said Limitation is meerly void: As if a Termer grants all his Term for so many years as shall be behind after his death, the same is a void Grant, for the Lessee may over-live all the Term, and

then

then it is incertain when it shall begin: And in this Case this word, Term, shall be taken for the Interest, and not for the time, vide 35 H.8. Br. Conditions 203. vide C. 2. part, in the Rector of Chedingstones Case, this Case vouched.

Mich. 32, *&* 33 *Eliz.* In the Common Bench.

CCCI. Gawton *and the Lord* Dacres *Case:*

IN Debt upon Surplusage of an Accompt by Gawton, against George Lord Dacres; It was said by Periam Justice, and not denied by any, that if I make J.S. my Auditor, generally to take Accompts of all my Bayliffs and Receivors, that he is not a sufficient Auditor without a Patent; for when a man is made an Auditor generally, he is an Officer, and an Officer cannot be without a Deed. But if a Bayliff, or Receiver be accomptable to me, it is as cleer on the other side, that I may appoint one to be my Auditor to take the accompt of him, pro hac vice by word; which Anderson granted: But if he afterwards takes an accompt of any by force or colour of the said Warrant without my Commandment, he is not a sufficient Auditor to such intent, either to take the accompt, or to assess the arrerages if the accomptant be found in arrear, or to make allowance if he be found in Surplusage: And by him, If one become my Bayliff of his own wrong, without my appointment, he is accomptable to me, but I am not compellable to make him any allowance for his Expences about my business. And if I assigne to such Bayliff of his own wrong an Auditor, he cannot make allowances of such Expences. Anderson, If my Auditor make allowance to my Bayliff for any collaterall Expences, which he hath expended in my affaires, which do not concern my Manor, wherof he is Bayliff, such allowance shall not bind me. And note, that in this Action the Plaintiff declared that he was Bayliff to the Defendant of certain Manors, Receiver of certain monies, and so retained, ad diversa negotia procurandam: And upon accompt the allowance was made unto him for his Board-wages, and other Expences in riding Circa negotia. And by Anderson, these allowances shall not bind the Defendant; for as Bayliff of a Manor, no Expences shall be allowed unto him, but those which the Bayliff hath expended within the Manor: And if I retain one to go about my business, he is not accountable. Windham, If I retain one to follow my business, and deliver to him money to disburse in such business, he is accountable. Anderson, It is so truly, but it is not in respect of the said Retainer, but as he was Receiver, and if he expend more then he hath received, he doth it without Warrant and no allowance shall be made unto him. If the Bayliff be found in Surplusage in the conclusion of the accompt, the Auditor ought to enter. Allocator super determinationem Compt. in surplusagiis, so much for such and such Expences, allocatis allocandis upon the next accompt: But in this Case it appeared upon the Evidence, that the Entry upon the foot of the acompt was, And so he is in Surplusage upon the determination of this accompt twenty six pounds: But the Auditor being examined, said, that it was not his meaning to allow unto him so much, but onely to find and expresse the certainty of the whole accompt, and so refer the allowance of it to the Defendant to whom he was Auditor: and upon that the Court said to the Jury, if they beleived the Auditor, that they should find against the Plaintiff, for upon the matter here is not any accompt, and so no allowance for the allowance if it had been according to Law ought to be entred, before Allocator, &c. and such allowance is as a Judgment, but here is not any allowance, for the Auditor did refer the same to the Defendant: But if the Jury doth not give credite to the Auditor, then the Court moved the Jury to find Devises.

it ſpecially that the party was Auditor without Deed, and the finding of the accompt as it is ſet down in the Declaration, and the manner of the concluſion of it. viz. That the Plaintiff was in Surpluſage upon the determination of the accompt for his Expences in riding Circa negotia defendendentis, and for his Board-wages twenty ſix pounds.

Mich. 32, & 33 *Eliz.* in the Common Bench.

CCCII. Chamberlayns *Caſe.*

Cattell taken in *Withernam*, worked.

IN this Caſe it was moved, whether Beaſts taken in Withernam, might be uſed and wrought by the partie as his proper Beaſts: And it was ſaid by the Court, that Beaſts diſtrained, as Cowes, could not be milked, nor Horſes wrought, but they ought to be put in the Pound open, and there the Owner might milk them and fodder them. But if Cowes be taken in Withernam, becauſe they are delivered to the party in lieu of his own Cattell, he may milk them, or if they be Oxen, or Horſes reaſonably work them, otherwiſe he ſhould be at great charges of keeping and paſturing of them, and no profit, or conſideration for it. Anderſon, It ſhould be a great inconvenience to the Common-wealth: For if the Cowes are not milked, the milk is loſt, and alſo the Cowes impaired thereby.

Mich. 32, & 33 *Eliz.* in the Common Bench.

CCCIII. Byne *and* Playnes *Caſe.*

Aſſumpſit.

IN an action upon the caſe by Byne againſt Playne, the Plaintiff declared, that whereas he himſelf had recovered againſt Thomas Ward in the Court of the Queen in Southwark, holden before Omeſley Steward there for the Mayor of London, the ſumm of twenty pounds, and had obtained out of the ſaid Court a Laveri facias directed to the Bayliff to do execution upon the Goods of the ſaid Thomas Ward, which then were in the poſſeſſion of the ſaid Plaintiff, and where the ſaid Bayliff by vertue of the ſaid Writ was ready to have done execution of the ſaid Goods; the Defendant came to the now Plaintiff, and aſſumed to him, that in conſideration that the ſaid Plaintiff would deliver to the Defendant the ſaid Goods, that he would in fourteen daies after Michaelmas next pay to the Plaintiff twenty pounds, or otherwiſe deliver to him the ſaid Goods again, if in the mean time no other makes Title unto them, and prove them to be his own Goods. And further, that the Plaintiff ſhall have free ingreſſe and regreſſe to a Chamber in the houſe of the Defendant in the mean time. And upon Non-aſſumpſit pleaded, it was found by the Jury, that ſuch a Recovery was in the ſaid Court, and that the Defendant did aſſume, &c. But they further ſay, that before the ſaid Recovery, the ſaid Thomas Ward was poſſeſſed of the ſaid Goods as of his own proper goods: And, by Deed indented, ſold them to his Brother R. Ward, in conſideration of a certain ſumm of money, with a Proviſo, that the ſaid Thomas Ward, notwithſtanding the ſaid ſale ſhould have the poſſeſſion of them for four yeares, which are not yet expired, paying to the ſaid R. Ward twenty ſhillings by the yeare, and if, at the end of the ſaid four yeares, the ſaid Thomas did repay the ſaid ſumm of money to the ſaid R. Ward, that then the ſaid ſale ſhould be void. And they further ſay, that the ſaid Robert Ward made Title to the ſaid goods by vertue of the ſaid ſale. Exception was taken to the Declaration, becauſe it was not ſhewed by what authority or Title the Court was holden; Alſo it ſheweth, that the Bayliff was ready to do Execution upon the ſaid Goods, but

but doth not shew where the said goods then were, but the exceptions were not allowed, for these matters are but inducement and conveyance to the action, and not the matter, or substance of it: Another exception was taken, because the request is not sufficiently alleadged: Licet sæpius requisitas, but that exception was not allowed, for here the Assumpsit is to pay at a certaine day, and then the request is not materiall, but where a Request is parcell of the Assumpsit, there an expresse Request ought to be tayed, as if the payment should be upon Request. As to the matter in Law, here is not any consideration, for the goods were not subject to execution, for Thomas Ward had but a speciall property in them, but the generall property was in R. Ward, and so no cause to deliver them back to the Plaintiff, and here by the Verdict the forrain title is proved, for proof ought to be by Verdict, which see Perk. 154. a. & 7. R. 2. t. Bar 241. For it appeareth, before the said Recovery, Thomas sold the goods with promise, ut supra. Owen, Although it be found that R. Ward had the generall property, yet Thomas had the speciall and present property, and that against R. Ward himselfe, so that during the said foure yeares R. Ward could not entermeddle with the goods, and though that no execution can be had against him who hath such a speciall property, yet that is not the case here, for here one who hath the possession of certain goods, delivers them to another, and in consideration thereof, he to whom the delivery is made, promiseth to re-deliver them unto the Baylee, or to pay so much mony, this is a good consideration, when a lawfull property or title he hath who makes the Delivery. And of that opinion were all the Justices, for it appeareth, that the Plaintiff had a possession of the said goods, and that the said Thomas Ward had a speciall property, and because of such possession was chargeable to an action of the said Thomas Ward, be it that the Plaintiff comes to the said goods by baylement or Trover, for by Periam, if goods come to another by Trover, and he delivereth them over, he is answerable to him who hath right unto them: The Delivery of these goods to the Defendant, is a good consideration, and the Defendant hath benefit by the use of them, and the property of the goods is not to be argued in this case, but the Delivery to the Defendant is the only matter: And because the Delivery of the goods to the Defendant, and the Assumpsit upon it, it was holden, although the goods were not lyable to execution, yet the Assumpsit was good, and afterwards Judgment was given for the Plaintiff.

Request.

Mich. 32 & 33 *Eliz.* In Communi Banco.

CCCIV. Vandrink *and* Archers *Case.*

VAndrink brought an action upon the case against Archer, and declared, that whereas he himselfe was possessed of twenty seven Ells of Linnen cloath, as of his own goods, the same came to the hands of the Defendant by Trover, and he knowing the said goods to be the goods of the Plaintiff, sold them unto persons unknown, and the money thereof proceeding did convert to his own use: The Defendant pleaded, that as to twenty foure Ells of the said Linnen cloath, long time before the losing, one Copland was possessed thereof, ut de bonis suis proprijs, and sold them to the Defendant, who before any notice that they were the goods of the Plaintiff, and before any request, sold them to persons unknown: And as to the other three Ells, he was alwayes ready to deliver them to the Plaintiff, and yet is, and upon these Pleas, the Plaintiff did demur in Law. Owen Serjeant, for the Plaintiff, That both Pleas are insufficient, the first Plea is not an answer but by argument, for the Plaintiff declares of a commission of his own goods, and the Defendant answers to a commission of his own goods, 33 H. 8. Br. Action

Trover and conversion.

sus

ſur le caſe, 109. In an action upon the caſe the Plaintiff declares, that the Defendant found the goods of the Plaintiff, and delivered them to perſons unknown, Non deliberavit modo & forma, is no Plea, but he ought to plead not guilty, and in an acton upon the caſe, the Plaintiff declared, that he was poſſeſſed of certaine goods, ut de bonis ſuis proprijs, and the Defendant found them, and converted them to his own uſe; It is no Plea for the Defendant to ſay, that the Plaintiff was not poſſeſſed of the ſaid goods as of his proper goods, but he ought to plead not guilty to the miſdemeanor, and gave in Evidence, that they were not the goods of the Plaintiff, and 4 E. 6. Br. action upon the caſe 113. The Plaintiff declared that he was poſſeſſed of certain goods as of his proper goods, and loſt them, and the Defendant found them and converted them to his own uſe, the Defendant pleaded, that the Plaintiff pawned the ſaid goods to the Defendant for ten pounds, for which he detained them according to the ſaid pawne, and traverſed the converſion, and by ſome it was holden, that he ought to plead not guilty, and give the eſpeciall matter aforeſaid in Evidence; and 2. & 3. Phil. and Ma. Dyer 121. The caſe of the Lord Mountegle, in an action upon the Caſe, the Plaintiff declared, upon a Trover of a chayne of Gold, and that the Defendant had ſold it to perſons unknown, the Defendant pleaded, That ipſe non vendidit modo & forma, and upon that the Plaintiff did demur in Law, and ſee 27 H. 8. 13. Where goods come to one by Trover, he ſhall not be charged to an action, but for the time he hath the poſſeſſion; But that is to be intended in an Action of Detinue, and not in an action upon the Caſe, for ſuch action upon the Caſe is not grounded upon the Trover, but upon the miſdemeanor, that is, the Converſion. And as to the other Plea it is utterly inſufficient, for the Plaintiff declares of a Converſion, and he pleads a poſſeſſion, that he is alwayes ready, and ſo doth not anſwer to the point of the action. Yelverton Serjeant, to the contrary, and he conceived for the firſt Plea, that it is a direct anſwer, for he hath juſtified his ſale to perſons unknown, for that he hath bought the goods of one Copland whoſe goods they were, and becauſe the Plaintiff hath demurred upon the Plea, he hath confeſſed the truth of the matter contained in it, ſcil. that the property of the goods was to Copland, and ſo in the Defendant by the ſaid ſale, and then he hath good cauſe to convert them to his own uſe by ſale or otherwiſe; And he conceived, that there is a difference, 27 H. 8. 13. betwixt Baylment, and Trover, for in caſe of Trover, the party is not chargeable but in reſpect of the poſſeſſion, which being removed, the action is gone againſt the Finder, for he who findeth goods is not bound to keep them, nor to give an account for them. And he put the caſe reported by Dyer, 13. & 14. Eliz. 306, 307. R. Fines brought an action upon the caſe, and declared, he was poſſeſſed of a Hawke, as of his proper goods at W. and caſually loſt it at B, and that it afterwards caſually came to the hands of the Defendant by Trover, and that he knowing it to be the Plaintiffs Hawk, ſold the ſame for money to perſons unknown; The Defendant pleaded that the Hawk firſt after the loſing of it came to the hands of one Feoffryes, who ſold it to one Rowly who gave it to the Defendant at A, who ſold it to Poulton, and the ſame was found a ſufficient Bar, and it is hard where goods, as Oxen or Horſes come to another by Trover, that he ſhould be charged to keep them and paſture them untill the Owner claimeth them, and therefore it is not reaſon but that he diſcharge himſelfe by the quitting of the poſſeſſion of them. And as to the other Plea, the matter of the Plea is good enough, and the defect is but in the forme, which becauſe the Plaintiff upon his Demurrer hath not ſhewed to the Court according to the Statute, he ſhall not take advantage of it, but the matter of the Plea is ſufficient, ſcil. the finding, and the offer to deliver it to the Plaintiff. Anderſon Juſtice, For the examination of the inſufficiency of this Plea, the nature of the action, and the cauſe of it is to be conſidered; the nature of the action, it is an action upon

upon the case, the cause, the Trover, and conversion; Then for the latter Plea his readinesse, to deliver it. It cannot be any answer to the Declaration of the Plaintiff: For this action is not Debt or Detinue, where the thing it selfe is to be delivered, for in such case, the Plea had been good, but the Conversion is the speciall cause of this Action, which by this Plea is not answered, and for the other Plea, the Declaration is not answered by it. But here is some matter of justification, for when a man comes to goods by Trover, there is not any doubt but by the Law he hath liberty to take the possession of them, but he cannot abuse them, kill them, or convert them to his own use, or make any profit of them, and if he doe, it is great reason that he be answerable for the same, but if he lose such goods afterwards, or they be taken from him, then he shall not be charged, for he is not bound to keep them, and so he conceived Judgment ought to be for the Plaintiff. Windham Justice, neither Plea is good, as to the first Plea, he confesseth the conversion, but hath not conveyed unto himselfe a sufficient title to the goods by which he might justifie the Conversion, for the Plaintiff declares of a conversion of his own goods, and the Defendant justifies, because the property of the goods was in a stranger who sold them to him, which cannot be any good title for him without a Traverse, unlesse he had shewed, that he bought them in an open Market, and then upon such matter he might well have justified the Conversion, and as to the other Plea, the same is naught also, for the goods are not in demand, and then the said Plea is not proper to say, that he is ready to deliver them, for damages only for the conversion are in demand, and not the goods themselves, and therefore the same is a Plea but by Argument, scil. He is ready to deliver, Ergo, he hath not converted, and yet the same is not a good argument, for if a man find my Horse, and rides upon him, or hereby he becomes Lame, or otherwise by excessive travell misuseth him, so as my Horse is the worse thereby; He may be ready to deliver me my Horse, and yet this action will lye, for such an abusing of the Horse is a Conversion to his own use: Periam Justice; The latter Plea clearly is insufficient, for it amounteth but to Not guilty, but for the first Plea, he doubted of it, for first the property is not traversable, nor the knowing, but upon the generall Issue pleaded, such matter may be given in Evidence, and he conceived, That where a man buyes goods of one who comes to them by Trover, that he may sell them, and shall not be answerable for them. And although it may be said, that the said matter may be given in Evidence, yet it is not good to put the same to the people, but to refer the matter to the Judgment of the Court: Walm. Justice, The latter Plea is clearly insufficient, but for the first he doubted of it, for he conceived, that the sale of the goods is not a Conversion: Anderson, The first Plea is, ut supra, and nothing in that is materiall or traversable, for all the Plea may be true, and yet the Defendant is guilty, for it may be that the Defendant himselfe sold them to the Plaintiff, or to another who sold them to the Plaintiff, and that afterwards the Defendant found them, and here the Conversion is confessed, and not so voided by sufficient justification, and by him, the sale to persons unknown is no good Plea, for his sale is his own Act, and it cannot be but he must have notice of the buyers, and therefore he ought in his Plea to shew their names: Periam, Contrary to that matter as to the naming of the buyers, for it should be an infinite thing for a Draper to take notice of every one who buyeth an Ell of Cloath of him: And afterwards the same Terme Judgment was given for the Plaintiff upon the insufficiency of the Plea.

Mich.

Mich. 32, & 33 *Eliz.* in the Common Bench.

CCCV. Walgrave *againſt* Ogden.

Trover and Converſion.

AN action upon the caſe was brought upon a Trover and converſion of twenty barrels of Butter, and declared, that by negligent keeping of them, they were become of little value, upon which there was a Demurrer in Law: And by the opinion of the whole Court upon this matter, no action lieth; For a man who comes to Goods by Trover, is not bound to keep them ſo ſafely, as he who comes to them by Baylment. Walmeſley, If a man find my Garments, and ſuffereth them to be eaten with Moathes by the negligent keeping of them; No Action lieth: but if he weareth my Garments; it is otherwiſe, for the wearing is a Converſion.

Mich. 32. & 33. *Eliz.* in the Common Bench.

CCCVI. Allexander *and the Lady* Greſhams *Caſe*.

Debt for arrerages of annuity

ALice Allexander, Adminiſtratrix to her laſt Husband, brought an Action of Debt for the arrerages of an Annuity, againſt the Lady Greſham, Executrix of Sir Thomas Greſham her late Husband, incurred in the life-time of her late Husband Sir Thomas Greſham: The Defendant pleaded, that ſhe had fully adminiſtred; the Plaintiff replyed, Aſſets, ſcil. That the Defendant had divers Goods in her hands not adminiſtred, which were the goods of the ſaid Sir Thomas at the time of his death, upon which they were at Iſſue. And it was found by ſpeciall Verdict, that Sir Thomas Greſham being ſeiſed of divers Mannors and other Lands in Fee, deviſed them by his laſt

Deviſes.

Will to his Wife the Defendant, to uſe at her own pleaſure: And by his ſaid Will requeſted his Wife to pay his Debts and Legacies: and further it was found, that at the Parliament holden 22 Eliz. a private Act was made, by which it was enacted, that the ſaid Lady ſhould take upon her the charge of all her Husbands Debts, and for the diſcharge thereof, ſhe ſhall ſell ſo much Land as will yeild ſo much mony as will ſerve for the payment of the ſaid Debts, and if ſhe ſhall faile therein, that then certain Commiſſioners ſhall be appointed for the ſale of ſo much Land, &c. and for all ſuch Debts as the ſaid Lady ſhould not acknowledge to be good and true Debts, that then the Creditors to whom they were due, ſhould repaire to the ſaid Commiſſioners, and they ſhould determine both of the certainty of the ſumm of the due Debts, and of the Damages for the forbearing thereof: and that afterwards the ſaid Creditors ſhould have their remedy againſt the ſaid Lady for ſuch ſumms of money ſo agreed upon by the ſaid Commiſſioners: and found the Statute at large, and that the ſaid Lady Greſham had ſold certain Lands parcell of the Poſſeſſions of the ſaid Sir Thomas, by which ſale ſhe had received the ſumm of twenty thouſand pounds, which yet is unadminiſtred for the greateſt part of it. And if upon the whole matter the ſaid ſumm of twenty thouſand pounds be Aſſets, then they find for the Plaintiff, but if not, then for the Defendant.

And it was moved by Hammon Serjeant, that here is Aſſets upon this matter, and that by the Common Law, for it appeareth upon the Will, that the Lands were deviſed to the Lady, to the intent that ſhe ſhould pay his Debts. And although the words of the Charge are, that the Teſtator requeſts the Lady to pay his Debts, the ſame in a Will doth amount to a Condition, and ſo the meaning of the Deviſor appeareth to be, that the money

ney which is levied by ſuch ſale ſhall be Aſſets, &c. 2 H. 4. 21, 22. A man makes a Feoffment in Fee to divers perſons, upon condition that they ſell the Land, and the money thereof coming diſtribute for his Soul. The Feoffor dieth, the Feoffees (who were alſo Executors of the Feoffor) ſell the Lands, the mony thereof coming is adjudged Aſſets. And ſee, 3 H.6. 3. And although it be not Aſſets by the Common Law, yet it is Aſſets by the ſpeciall Statute, which ordaines, that ſhe ſhall be charged with the Debts, and that the Lands ſhall be ſold. And it was found by the Verdict that ſuch Lands were ſold, and ſuch money levied upon the ſale, which are adminiſtred. And although the ſaid tweny thouſand pounds were never the Goods of the Teſtator, yet as the Caſe is, 3 H. 6. 3. If Executors recover Damages in treſpaſſe of Goods taken away in the life of the Teſtator, ſuch Damages ſo recovered are Aſſets. So if Executors redeem a Pledge with their own proper Goods, the ſame is Aſſets in their hands, by Kingſmill, Vavaſour, and Fiſher, 20 H.7.42. And where the Executors took of one who was indebted to their Teſtator in a ſimple Contract, the ſame is Aſſets, 31 E.3. And ſee many Caſes of ſuch ſpeciall Aſſets, 7 Eliz. in Plowdens Comment. in Chapman and Daltons caſe, 292. It hath been objected, that the ſpeciall Aſſets enacted by Parliament, do not maintain the generall Aſſets intended in the Iſſue, but be conceived, the ſame is well enough. As 27 H.8.21. In an Action upon the Statute of 21 H.8. for that the Defendant hath occuppyed Land to farm againſt the Statute. The Defendant pleaded, Non tenuit ad firmam contra formam Statuti: And gave in Evidence, that he had taken to Farm for the maintenance of his houſe, the ſame is a good Evidence, and ſhall maintain the Iſſue, for he did not occupy againſt the form of the Statute: for there is a clauſe in the Statute to that purpoſe. Puckering Serjeant to the contrary, That it cannot be ſaid Aſſets by the Statute, and that the Plaintiff upon this generall Iſſue ſhall not take advantage of the ſpeciall Aſſets enacted by Parliament: And here the Plaintiff hath not purſued the Statute, for in caſe the Defendant will not confeſſe the Debt, by the Statute the Commiſſioners ought to determine of it, and aſſeſſe Damages for the forbearing, and then the party is to have her remedy for all as ſhall be ſo determined by the Commiſſioners by action of Debt: and becauſe the Plaintiff hath not followed the ſaid Statute, thoſe twenty thouſand pounds ſhall not be Aſſets as to her, for they are not agreed of the Debt, nor of the Damages for it, but the Commiſſioners are to appoint ſale of the Lands, ſo as the money ariſing of the ſale of any Lands, ſhall not be Aſſets but of ſuch Lands which have been appointed to be ſold by the order of the Commiſſioners. And as to the Common Law, the ſame is not Aſſets, but where Lands deviſed to be ſold by the Executors for the payment of Debts and Legacies, in ſuch caſe the money ariſing of ſuch ſale is Aſſets. And ſee 9 Eliz. 264. Dyer, A man deviſed his Lands to be ſold by his Executors, and that the money thereof coming ſhall be diſpoſed in payment of Legacies expreſſed in his Will, the Land is ſold; by Catlin, Dyer and Sanders, the money thereof coming is Aſſets: but 4, & 5 Phil. & Mar. Dyer 152. the Law was otherwiſe taken. Where a man deviſed that his Executors ſhould ſell his Land, and that his Daughters ſhould have ſuch portions out of the monies thereof coming; the Land is ſold accordingly, the Daughters ſued the Executors in the Spirituall Court. In that Caſe a Prohibition lyeth, for it is not a Legacy Teſtamentory, but out of the Land, &c. And alſo in the principall caſe, the Lands are not deviſed to be ſold, but there is onely a Requeſt to his Wife, that ſhe would pay his Debts, without any condition, or expreſſe direction, or limitation, 30 H. 8. Land deviſed to Executors to ſell, and the money thereof coming to be divided between his children: the money ſhall not be Aſſets, and if it be not Aſſets by the common Law, but ſpeciall Aſſets by a ſpeciall Law, the Plaintiff ought to have ſhewed the ſame in his Declaration, and then to have maintained againſt the De-

Aſſets.

fendant the said speciall Assets upon the Statute: As if in Debt upon an Obligation, the Defendant will plead, Non est factum, and give in Evidence the Statute of 23 H. 6. the same shall not maintain his Plea of Non est factum, but he ought to have pleaded the speciall matter in Bar. And see 4 H. 7. 8. So the Plaintiff here ought to have in her Replication shewed the especiall matter upon the Statute. Anderson and Walmesly conceived, that the same is Assets within the Issue, and that the Defendant is chargable as Executrix, otherwise there is no remedy, and the Act confirmes her to be Executrix, and ordaines, that she shall take upon her the charge of payment of Debts, and that the Goods and all the monies which come by sale of the Lands and Woods shall be Assets. And because that by the said Act the money coming by sale of Woods and Lands are joyned together with the Goods of the Testator in the same plight, all are in the same degree, and both equally Assets. Periam did not speak to that, but Windham held, That these Assets found by the Verdict, are not Assets intended in the Will, and that the Plaintiff hath not pursued the Statute, which makes such matter Assets. It was adjorned.

Pasch: 33 *Eliz*: in the Common Pleas.

CCCVII. *The Queen and the Bishop of* Yorks *Case.*

Quare Impedit.

The Queen brought a Quare Impedit against the Bishop of York, and one Monck; and counted upon a Presentment made by him, Hen. 8. in the right of his Dutchy of Lancaster, and so conveyed the same to the Queen by discent: The Bishop pleaded, that he and his Predecessors have collated to the said Church, &c. and Monck pleaded the same plea,, upon which there was a Demurrer. And it was moved by Beaumont Serjeant, That the plea is not good, for a Collation cannot gain any Patronage, and cannot be an Usurpation against a common person, much lesse against the Queen, to whom no Lapses shall be ascribed: and although the Queen is seised of this Advowson in the right of her Dutchy, yet when the Church becomes void, the Right to present vests in the royall person of the Queen: and yet see the old Register 31. Quando Rex præsentat non in jure Coronæ tunc incurrit ei tempus. Hammon Serjeant, By these Collations the Queen shall be put out of possession, and put to her Writ of Right of Advowson; but the same ought to be intended not where the Bishop Collates as Ordinary, but where he collates as Patron, claiming the Patronage to himself, for such a Collation doth amount to a Presentation; and here are two or three Collations pleaded, which should put the Queen out of possession, although she shall not be bound by the first during the life of the first Incumbent. vide Br. Quare Impedit 31. upon the abridging of the case of 47 E. 3. 4. That two Presentments the one after the other shall put the King out of possession, and put him to his Writ of Right of Advowson, which Anderson denied. And it was holden by the whole Court, Here is not any Presentation, and then no possession gained by the Collations: and although the Bishop doth collate as Patron, and not as Ordinary, yet it is but a Collation. And there is a great difference betwixt Collation and Presentation, for Collation is a giving of the Church to the Parson, and Presentation is a giving and offering of the Parson to the Church, and that makes a Plenarty, but not a collation. And although that the Queen hath the advowson, by the right of her Dutchy, yet that makes not any matter, for the person of the Queen priviledgeth all her Capacities: and therefore Plenarty is no plea against the Queen, be she seised of the Advowson in the Right of her Crown, or of her Dutchy; but when she claimes by Lapses, it is otherwise. And afterwards Exception was

Collation gaines not the Patronage of the King.

Plenarty no plea against the King.

was taken to the Writ, because it is not set forth in the Writ how the Queen claimed the Advowson; as where the King had Right to present by reason of the Temporalties of the Bishop in his hands, the Writ shall say, Ratione Archiepiscopatus Cant. nunc Vacant. or Ratione Custodiæ: And so because this Advowson is parcell of her Dutchy, the Writ ought to say so: And Anderson chief Justice was of opinion, that the Writ was good enough, notwithstanding the want of that clause, Ratione Ducatus, for both waies it is good and sufficient, generally, or specially; as where a man hath an Advowson in the Right of his Wife, and the Husband brings a Quare Impedit, the Writ shall be generall, ad suam special. Donationem, without the mentioning of his Wife. See the Book of Entries 483. the Writ is generall, but the Count is speciall. And there is the very case of the Dutchy of Lancaster, and then the Writ is generall, but the Count is ratione Ducatus sui Lancastr. And such an avoidance of a Church, parcell of the Dutchy, may be granted under the Great Seale: And see the case of the Dutchy of Lancaster in Plowden to that purpose, and afterwards a President was shewed, in An. 32 H. 6. Where the Writ was generall, and the Count was Ratione Ducatus.

CCCVIII. *Pasch.* 33 *Eliz.* in the Common Pleas.

Leases.

A Man made a Lease for years to begin at the Feast of our Lady Mary, for one and twenty yeares, without shewing the certainty at which Feasts the Annunciation, Purification. &c. yet the Lease is good enough, and the Lessee may determine the certainty of the beginning of the Term by his Entry, at which of the said Feasts the said Term shall begin, by Anderson chief Justice, but Periam doubted of it.

Pasch. 33 *Eliz.* in the Common Pleas.

CCCIX. Blagrave *and* Woods *Case.*

Surrender to the Steward out of Court.

IN an action of Trespasse brought by Blagrave against Wood, of Lands in Totting in the County of Surrey, concerning a Surrender made to the use of Sir Thomas Holcroft, by Alice Pagnam, 7 E. 6. before one Forcet then Steward there: The Issue was, If at the time of the said surrender, the said Forcet was Steward of the said Mannor. And the Jury found a speciall Verdict, scil. That the said Forcet circa 9 Aprilis, 7 E. 6. was retained by one Elizabeth Pagnam, then, before and afterwards Lady of the said Mannor, to be her Steward there for the keeping of the Courts of the said Mannor, and this Retayner was onely by Word in the Countrey, and no Fee or Annuity given for the exercise of the said Office: and that the said Forcet, according to the said Retayner, had kept Courts there divers times. And further, that such a day and yeare at S. Dunstons in the East, the said Forcet took a Surrender, which was entred in the Rolls the next Court: and that before that and after, he took divers Surrenders as well out of Court, as in Court, and had holden divers Courts there. And upon this Verdict, it was moved by Snagg Serjeant, That Forcet upon the matter found by the Verdict, is not such a Steward, that may take Surrenders out of Court, being retained only by word, although to do other Acts in Court he be a sufficient Steward, for in the Court he is as a Judge, and no body is to dispute his Authority there. And there is a great difference betwixt a Steward of a Mannor, and a Steward of Courts; and a Steward of one Mannor hath not as great an authority as the Steward of another Mannor, for a Steward of a Mannor may take Surrenders in any place, otherwise it is where a Steward is retained to keep

Vide C. 4. part. 30 Dame *Holcrofts* case.

Courts, for he hath no authority but to keep Court, and all his power is within the Court, and not without. See 8 Eliz. Dyer 248. Drew Serjeant to the contrary, Here Forcet upon this Retainder was Steward at the Will of the Lady of the Mannor, which Will shall not be said to be determined, untill the Lady doth discharge him: and the difference which hath been taken betwixt Steward of Courts, and Steward of a Mannor is nothing to the purpose, for there is not any reason in it: and it is true, an Assise cannot be brought of such an Office, without a Patent of it, for it cannot passe for life without a Deed, and although a Steward in the Courts of Copyholders be a Judge, yet he may be appointed without Deed: as where two submit themselves to the arbitration of others, now the Arbitrators are Judges as to that intent, and yet they may be appointed Arbitrators, and discharged without Deed, 19 H. 6. 6. 5 E 4.3. 21 H.6.30. but they cannot by their award transfer Free-hold from one to another, 21 E.3.26. 14 H.4.18. and 17. by Culpeper and *Skreen*; and see as to a Steward retained by word, 8 Eliz. 248. and see 12 H,7.25,26,27. where a Bayliff of a Mannor may be appointed without Deed, so of an under-Sheriff, and yet he is a Judge. Owen Serjeant contrary, Here Forcet at the time of this Surrender was not Steward, but the Retaynder void. 1. No Fee is allowed unto him for the exercise of the said Office, 3 H. 6. A Labourer may be retained without promise of any Sallary in certain, for it is appointed by the Law. 2. He is not retained by Deed, and although he may be retained without Deed to hold Court, pro hoc vice, yet if the Retainer be for life, or for yeares, it ought to be by Deed. 3. He was retained to keep the Court, but not to be Steward, which shall be intended to hold Court, and then when that is past, his authority shall cease, and then all which he doth afterwards is void. But if he had been retained to be Steward of the Mannor, then the Surrender taken out of Court had been well enough. 4. There is not any custome found by the Verdict, to warrant such a Surrender taken out of Court, and then if the Surrender be not warranted by their custome it is voyd. Yelverton to the contrary, In all cases and reall actions which concern Lands, the Suitors are the Judges, but in personall actions under the summ of forty shillings the Steward is Judge: and although he be a Judge, yet he may be appointed without Deed. And whereas it hath been objected, that no Fee is appointed for the exercising of the Office, the same is not materiall as to the Grant, but the party is not compellable without a Fee to do the Service: and a man may be constituted Bayliff of such a Mannor without Deed, and yet more doth appertaine to the Office of the Bayliff, then to the Steward: as if the Lord of a Mannor be beyond the Sea, the Writ of Right shall be directed to the Bayliff of the Mannor: and see 21 H.7.36,37. Where the Sheriff, or Steward of a Mannor may be without Deed: and here in the principall case, the Retayner is not to keep one Court, but to keep the Courts of the Lady of the Mannor, scil. all her Courts, untill he be dischaged. It was adjourned.

Pasc. 33. *Eliz.* In the common Pleas.

CCCX. Ascew *and* Fuliambs *case.*

Audita Querela.

Ascew was bounden by Statute to Fuliamb, and there was not two Seals put to the Statute, and Execution was sued upon the said Statute, the Conusor brought an Audita Querela, and they were at Issue, if two Seals were to the said Statute, and tryed for the Plaintiff in an Audita Querela by the Sheriff of the city of Lincolne; And it was moved by Glanvill Serjeant, That the Issue ought to have been tryed by the certificate of the Mayor of Lincolne

colne, before whom the acknowledgment was, and not by Jury, which was denyed, for the Issue is not whether any such Statute was acknowledged or not, but whether the Statute in question hath two Seals or not, and that is not recorded by the Mayor, as the Statute it selfe is: Another Exception was taken, It appeareth by the Margent of the Record, that the Issue was tryed by the County of Lincolne, where it ought to be tryed by the County of the City of Lincolne, for Lincolne only is in the Margent, But to that it was said, that such is the usuall forme, to which the Prejgnothories agreed, and the Book of 18 E. 3. 25. was urged, where execution of Lands of the Conusor was awarded upon a Statute Merchant, and the Statute was to pay, &c. 16 E. 3. But the Originall Writ which issued to take the body of the Conusor was 14 E. 3. And upon that Error brought: And the Court agreed that case, but these two cases do differ, for there the Processe was misawarded, not so here: And although a Writ of Error may lye, yet the same doth not prove, but that an Audita Querela may lye also: And afterwards Judgement was given for the Plaintiff.

Pasch. 31. *Eliz.* In the Common Pleas.

CCCXI. Jennings *and* Gowers *Case.*

IN the Case betwixt Jennings and Gower, the words were; That if the wife of the Devisor would permit one Wats to enjoy such a Terme for the Term of three years next following, that then she should have all the residue of his Goods and Chattells as his sole Executrix, &c. Anderson cheife Justice conceived, That shee should not be Executrix; For she is to be Executrix, upon a condition precedent to be performed before that shee be Executrix: And the condition is impossible to be performed, and then shee shall never be Executrix, for where an estate is to be created upon a condition impossible to be performed, there the estate shall never come in esse, and here the condition is impossible, for how can shee suffer Wats to enjoy the Terme for three years, next following, & the 3. years ought to be past before she hath any power, either to permit or resist, for until the three years be encurred, she cannot be Executrix, nor before the three years expired can shee bring any action as Executrix, for her authority doth not begin before the three years be expired. Walm. Peri. & Wind. contrary; Although a grant upon a condition precedent doth not take effect untill the condition be performed, yet such a construction ought not to be used in this case, so the intent of the Devisor in this case shall stand: If the condition had been, that if the wife will finde meat and drink to such a person untill his death, That then shee shall be Executrix, shall not the Wife be Executrix till after the death of such party? truly yes, for otherwise shee should never be Executrix, which is utterly against the meaning of the Testator; for it was not his intent that the Ordinary should commit Administration of his goods in the mean time: And afterwards Anderson changed his opinion, and agreed with the other Justices: Periam, The subsequent words prove directly, that the meaning of the Testator was, to make his Wife Executrix immediatly, untill shee were disturbed by the said Wats, for the words are, that if he refuse to suffer the said Wats to enjoy &c. Then his Son shall be his Executor, which words imply, that by a disturbance made by the Wife her Executor-ship should cease, and that the Son should have it, which cannot properly be if shee was not Executrix from the begining. And it is the usuall course in the construction of Wills, to consider all the clauses of the Will, and to adjudge upon all the words of the Will, and not upon one part only, and such construction the Judges used in the cases of Param. and Yardley, and Welden, and Elbing. And afterwards at another

another day Judgment was given for the Wife; That ſhee was Executrix preſently, and her authority ſhould not expect untill the three years were expired, if not that any actual diſturbance can be proved to be or have been made by the Wife againſt the Will of the Deviſor, and the words of the Will, will receive ſuch conſtruction, that ſhee ſhall be Executrix untill an actuall diſturbance of Wats.

Paſch. 33. *Eliz.* in the Common Pleas.

CCCXII. Palmes *and the Biſhop of* Peterboroughs *Caſe*.

Quare Impedit.

IN a Quare Impedit by Margaret Palmes againſt the Biſhop of Peterborough, who pleaded, That the Plaintiff did preſent unto him one I S, of whom the Biſhop asked if he were within Orders, & if he had his Letters of orders, & becauſe the Preſentee could not ſhew the Biſhop his Orders, he refuſed him: And commanded him to come another time and ſhew to him his Orders, and that the Preſentee did never do it, nor offered to the ſaid Biſhop his ſaid Orders, without that he did diſturb him in other manner. And by Periam and Anderſon it is no Plea, for upon his own ſhewing the Defendant is a diſturber: For although that the Statute of 13 Eliz. requires that no man ſhall be admitted to a Benefice with cure of ſouls, if he be not a Deacon, yet the Statute doth not extend, to compell the Clark to ſhew his Orders, and therefore when he for ſuch a frivilous cauſe doth refuſe to admit him, the ſame is a diſturbance; And afterwards exception was taken to the Count, becauſe that the Plaintiff being Tenant for life of the Advowſon of the gift of her Husband, had not alleadged any Preſentment in her Husband, or any of his Anceſtors, but only in her ſelfe, But that was not allowed, for that point hath been lately over-ruled in this Court, in the caſe betwixt Specot and the Biſhop of Exeter, & 8 H. 5. 4 adjudged accordingly, vi. 9 H. 7. 23. And the clear opinion of the count was, that the court was good notwithſtanding that exception: As to the matter of the Plea the court doubted of it, for the plea was, that the Biſhop demanded, of the clark preſented, his Letters of Orders, & Letters Teſtimoniall, of his good behaviour, and his Letters Miſſive, and he did not ſhew them but requeſted of the Biſhop the ſpace of a week, to ſatisfie the Biſhop in thoſe points, which was allowed unto him, but he never returned, for which cauſe the Biſhop afterwards refuſed, &c. And it was ſaid upon that Plea, That the clarke who is preſented, ought to make proof to the Biſhop that he is a Deacon, and that he hath Orders; otherwiſe by the Statute of 13 Eliz. the Biſhop is not bound to admit ſuch Clarke, but the Statute doth not compell the Clark to ſhew his Orders, for perhaps he hath loſt them, but how his Orders ſhould be proved, it was much doubted: Anderſon, The Biſhop may examine him upon oath, if he hath Orders or not; But as to the Letters Teſtimoniall of his good behaviour and ſufficiency, the Biſhop ought to examine the ſame himſelfe, and if he give day and defer the Admiſſion becauſe he is not reſolved therein, he is a Diſturber if the Clarke come to him in a convenient time: And the Biſhop cannot refuſe a Clarke for the want of Letters Teſtimoniall.

Refuſall of the Biſhop.

Paſc. 33. *Eliz.* in the Common Pleas.

CCCXIII. Linacers *Caſe*.

IN an Audita Querela brought by Linacer, It was ſaid by Anderſon cheife Juſtice, That if a man be in execution by his body and Lands upon a Statute;

tute; If the Sheriff permit the Conuſor to goe at Liberty, yet the Execution of the Land is not diſcharged; But if he goe at large by the conſent of the Conuſee, then the whole Execution is diſcharged: And the Conuſor ſhall have his Land againe preſently.

Paſch. 33 *Eliz.* In the Common Pleas.

CCCXIV. Brownſall *and* Tylers *Caſe.*

THe Caſe was, that Tenant in tail brought a Writ of Entry, Sur diſſeiſin and the Writ was generall, and it was moved, if the Writ was good and 21 H. 6. 26. was vouched, where it is holden, that the Writ ought to be ſpeciall, ſcil. to make mention of the tail: But it was holden by the Court, that the generall Writ is good enough. And then the count ought to be ſpeciall, vi. Fitz. 191.

Trinit. 30. *Eliz.* In the Kings Bench.

CCCXV. Ward *and* Knights *Caſe.*

IN an Action upon the caſe, the Plaintiff declared, That whereas Loſtock parcell of the Mannor of E in the County of Suffolk is an ancient Towne, and ancient Demeſne of the Crowne of England, and that, time out of minde, &c. all the men, and Tenants of ancient Demeſne ought to be quitted of Toll in all places within the Realme, for them, their Goods and Chattells, &c. And whereas the Queen by her Letters Patents the tenth of September, the nineteenth of her Reign, commanded all Mayors, Bayliffs, Conſtables, &c. to permit and ſuffer the men and Tenants of ancient Demeſne, to be quit of Toll, Murage, and other exactions throughout the whole Realme; And whereas the Plaintiff was an Inhabitant, and Tenant in Loſtock aforeſaid, and ſuch a day and yeare carryed his Goods to Yarmouth in the ſaid County, the Defendant not ignorant thereof, had taken and carryed away a Cable of the Plaintiffs goods, of the value of eight pounds for Toll, to his damage, &c. The Defendant pleaded by Proteſtation, that Loſtock was not ancient Demeſne, and by Proteſtation that the Tenants of ancient Demeſne ought not to be quit of Toll, he ſaid, That the Towne of Yarmouth is an ancient Borough, and that they had been incorporated by the name of Bayliff and Burgeſſes, &c. And that they have had, time out of minde, &c. an Officer called a Water-Baly, and that, time out of minde, &c. they and their Predeceſſors have had and taken Toll of the Tenants and Inhabitants of Loſtock, for any of their goods brought thither to Merchandize with, and if it be not paid, they have uſed time out of mind, to diſtraine for it by their Water-Bayly: And ſaid, that the Plaintiff ſuch a day brought to the ſaid Towne of Yarmouth, two thouſand weight of Cable Ropes to ſell, for which there was due for Toll ſix pence, for Murage ſix pence, for Thronage four pence, and the Defendant being Water-Bayly demanded of the Plaintiff the ſaid ſumm which he refuſed to pay, for which he took the ſaid Cable, nomine diſtrictionis, for the ſaid Thronage, &c. Golding for tet Plaintiff, the Defendant hath not ſet forth in himſelf any authority to demahe the duty: For he ſhews, that they have uſed to diſtraine by their Watnd Bayly, but not that they have uſed to demand it by him, and it may be, ter they have ſeverall Officers, one to demand it, and another to diſtraine forhat And alwayes when a man demands a thing againſt common Right, he it:n

Toll.

Preſcription.

to

to shew authority expresse in the whole: And as to the matter in Law, scil. The Prescription to have Toll of the Tenants in ancient Demesne, it cannot have a lawfull beginning: As 21 H. 7. 40. The Lord of a Mannor sayes, that he hath had a Pound within his Mannor, time out of mind, &c. And that he hath used to have of every one who breaks his Pound, three pounds, the same is a void custome to bind a stranger, for it cannot have a lawfull beginning, and see 5 H. 7. 9. b. One prescribed, that if any Cattell be taken in such a place, Damage Feasance, that he might distraine them and put them in Pound untill the Owner had made amends, at the will of him who distrained them, the same is a void Prescription, for it cannot have a lawfull beginning, and time cannot make such a thing to be good, The King may grant Tollage, Pontage, &c. but not to the prejudice of another, as 22 E. 3. 58. The King cannot grant to one Thorough-toll to passe by Highways, for it is an oppression to the people, for every High-way shal be common to every one, see 16. E. 3. Grants 53. and here the Tenants of ancient Demesne are quit of Toll by the common Law, and not by Prescription, which see Fitz. 14. and such Tenants have an Inheritance in such Liberties, which the King by his grant cannot take away, & then if it cannot have a lawfull beginning, it cannot be good by Prescription: also this Prescription is against the Common-wealth, therefore it is a void Prescription, and the Common-wealth is much respected in Law, and things which in themselves are justifiable by reason, are not justifiable if they be injurious to others, as 21 E. 4. & 8 E. 4. 18. Fishers may prescribe to dry their Nets upon the Lands of others, and none can prescribe against such a Prescription, so here, all Lands which are ancient Demesne, are holden in Socage, so as they were all Husbandmen, who manured their Lands for the sustentation of the Kings Subjects, to which they had such priviledges to be the better able to follow their Husbandry, and therefore to disable such profitable Subjects, and to prescribe against these Liberties and Priviledges, is to take away the name of ancient Demesne, and to make their Lands at the common Law. Hobart contrary: To shew the authority to demand is not necessary, for our Prescription is not upon demand to distraine: For the common Officer hath authority to demand, for they ought to demand it, who ought to take the thing demanded, and those are the Bayliffs and Burgesses, and then when their Water-bayly doth it, it is as much as if it had been done by the corporation, which see 48 E. 3. 17. The Mayor and comminalty of Lincolne, brought an action of covenant against the Mayor and Comminalty of Derby, and declared, that the Mayor and comminalty of Derby had covenanted with the Mayor and comminalty of Lin. that they should be quit of Murage, Pontage, Custom & Toll within the Towne of Derby, of all Merchandises of those of the Towne of Lincolne; and further declared, That I W and H M, two Burgesses of the Towne of Derby, had taken certain Toll of certaine Burgesses of the Towne of Lincolne, &c. Exception was taken to this Declaration, because they had alleadged the taking of such Toll, not by the corporation of Derby, but by I and H. two of the Burgesses of it, in which case the Plaintiffs might have an action of Trespass against the Burgesses, for the act of any of the corporation is not the breaking of the covenant, made by the comminalty, but it was not allowed; for if the common Officer of the Towne doth any thing for their common use, as it is intended such thing was done by the Officer, it is reason all the Towne be answerable for it, and the whole comminalty by intendment cannot come at one time to take, &c. and so in our case, for as much as the corporation ought to make the demand, and their common Officer doth it to their use, the same is the act of the whole corporation. As to the matter in Law, we have pleaded specially; That we took Toll only of those things which are brought by Sea by Merchants, and not otherwise, and I conceive that Tenants in ancient

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cient Demeſne, are not diſcharged of Toll for all things, but only for ſuch which ariſe out of their Tenements, or are bought for their Tenements or Families there, and their ſuſtentations, according to the quantity of their Tenements, 9 H. 6. 25. 19 H. 6. 66. They ſhall be quit of Toll, of all things ſold and bought coming of their Lands, or for the manurance of their Lands: And 7 H. 4. 111. Tenants of ancient Demeſne, ought to be quit of Toll for Oxen or Beaſts bought and ſold for tillage, and manurance of their Lands, and for their ſuſtenance and maintenance of their Families, and for putting them to Paſture to make them fat and more vendable, and ſo to ſell them, &c. And ſee accordingly, F.N. B. 224. D. See Crook 138. 138. 28 Eliz. A Judgment was given for the ſaid parties, for the Plaintiffs: but there the Plaintiff declared generally, and the Defendant did demur in Law generally, wherefore by common intendment, the Cattell were bought for the tillage and manurance of their Lands: For there it was not ſhewed (as it is here) that it was to Merchandize: Alſo we have juſtified, not only for Toll, but alſo for Trouage, and that they have not ſhewed, and therefore as to the Trouage our juſtification is good enough, for their priviledge ſhall not be conſtrued to extend beyond the words of it: As the priviledge of the Law is, That if I leave my horſe at a Smiths Forge to be ſhod, there my Horſe cannot be diſtrained, but if I or my Servant take the Sadle from the Horſes back, and lay it in the Smiths Forge, the Sadle may be diſtrained. Then here are two cuſtomes meeting together, and to begin together, and the one was not before the other, then the particular cuſtome ſhall ſtand: And I conceive that by the Writ, de exonoratione ſect. Fitz. N. B. 161. b. The Tenants in ancient Demeſne, have not alwayes ſuch priviledges, for the Writ ſaith, quod ſi ita ſit, then, &c. and niſi ipſi, & eorum anteceſſores tenentes de eodem manerio venire conſueverunt temporibus retroactis, and ſee the ſame matter in the Regiſter, 181. And afterwards, Judgment was given, quod querens nihil capiat per billam, for the Juſtices were of opinion, that the Tenants in ancient Demeſne ſhould pay Toll, for their Merchandizes.

Mich. 32, & 33 *Eliz.* in the Kings Bench.

CCCXVI. Lancaſter *and* Lucas *Caſe*.

Leaſes.

TRespaſſe was brought for entring into the Parſonage-houſe of Ringhall, and divers Lands appertaining to it: The Defendant being Farmor of the Parſonage, pleaded, Not guilty; and the Jury found, that one Tybbin was Parſon of the ſaid Church, and that one Aſh and Dorothy his Wife, Wivell and Drauſfeild were Patrons of the ſaid Church, ſcil. Aſh and his Wife in the Right of his Wife, Wivell as Tenant by the Curteſie, the Reverſion to his Son, and Drausfeild alſo as Tenant by the Curteſie, but without Iſſue by his Wife, &c. ſo as the Inheritance of the ſaid Parſonage was in Wivell and Aſh: and afterwards the Biſhop of Cheſter being Ordinary, the Parſon and Patrons, 4 E. 6. joyned in a Leaſe of the Rectory (which Leaſe was voyd as to the Wife of Aſh) to S. who aſſigned it to the Defendant. All the Leſſors dyed: and further found, that Aſh and Wivell were Heires of the Patronage, and that the Church being voyd, the Preſentment came to the Biſhop by reaſon of Laple, and that the Succeſſor of the Biſhop had Collated his Clark. Cook argued, And he conceived that the ſame

now Incumbent ſhould avoid the Leaſe in toto; and the caſe is but this: Three Coparceners Patrons of an Advowſon, or Tenants in Common, the Parſon, three Patrons, and the Ordinary joyn in a Leaſe (where the one of them is a Feme-covert; and ſo her Act void) If the Succeſſor of the Incumbent being preſented by Lapſes ſhall avoid it in all: and he conceived that he ſhould, for all three have intereſt in the Parſonage, and all three ought to agree, but the agreement of the one is worth nothing: But it hath been ſaid, that that is but matter of aſſent, and that the aſſent of the one is as ſtrong as the aſſent of them all; As if many Joynt-tenants hold by certain Services, and the Lord granteth the Services to a ſtranger, and one of the Joynt-tenants attorneth to the Grant, the ſame is as ſufficient as if they had all attorned, Lit. 128. 566. Otherwiſe it is of a Rent-charge, for there all the Joynt-tenants of the Lands charged upon the grant of the ſaid Rent ought to attorn to the Grant; for the Ter-tenant ought to attorn, and one of them is not Ter-tenant: And in caſe of a Rent-charge, the Avowry is upon the Lands: but Attornment differs from our caſe, for Attornment is but a bare aſſent, without any intereſt in him who attorns, for an Abator may do it; but here is matter of Intereſt, and in Attornment, Attornment for one acre is effectuall for all, 18 E.3. Fitz. variance 63. but otherwiſe it is in caſe of Confirmation for one acre, the ſame doth not extend to the reſt, for in ſuch caſe an Intereſt paſſeth. So here, the one of them is not Patron, therefore all of them ought to concur, 31 E.3. Grants 61. That ſuch act of the Patron ſhall not bind but according to the Eſtate of the Patron, which ſee Lit. 112. 528. as if Tenant in tail confirm, the ſame ſhal not bind the Preſentee of the iſſue, See Fitz. Grants 104. Int. R. 2. The caſe was that the Biſhop of Covent. and Lichfeild had two Chapters, one of Coventry, the ſecond of Lichfeild, and he made a Conveyance, but one Chapter only did confirme it, the ſame doth not bind the Succeſſor, for both are but one Chapter in reſpect of the Biſhop, and ſee the caſe abridged by Statham to Aſſize, for the Biſhop is choſen by both Chapters, there a confirmation muſt be of them both: The caſe in Dyer 11 Eliz. 282. Thark, Biſhop of Dublin, hath two Deanes and Chapters, the one ſurrendreth without the aſſent of the Biſhop, and afterwards the other Dean and Chapter confirmeth a Leaſe made by the Biſhop, the ſame is good: I confeſſe that; for the Surrender was by Act of Parliament, and ſo one ſole Chapter remained: And in our caſe, the Leaſe cannot be good in part, and void for the reſidue, for all are but one Patron, as 22 H. 6. 47. Two Coparceners are, they make compoſition to preſent by Turnes, a Writ of Annuity is brought againſt the Incumbent, he ſhall have aid of both, and ſee the Caſe betwixt Gore and Dawbney in the Exchequer Chamber upon a Writ of Error, where two are accountable, an Account made by the one is not good, for both the Accountants ſhall make but one account, and therefore the Account of the one cannot be good: And the Lord Anderſon put this Caſe, two Joynt-tenants of a Manor, the one of them doth grant a Copy, the ſame is void, for he is not Dominus pro tempore: And ſee as to the aſſent of them all, &c. 3 Eliz. 190. Dyer. But it hath been objected, That now the Incumbent comes in by the Ordinary, and not by the Preſentment of the Patron, and the Ordinary is bound by the confirmation of his Predeceſſor, as to that the collation of the Biſhop by Lapſes, is in the right and ſted of the Patron, and as the Preſentee of the Heire of the Patron ſhall avoid, &c. ſo alſo of the Ordinary: and 20 E.3, Bar. Preſentment 12. The Patron ſhall have a Writ of Darrein-preſentment upon the preſent. of the Biſhop for Lapſes, and 22 H.6. If a man recover an Advowſon, and after the Biſhop collate for Lapſes, the ſame is an Execution of the Judgment, & wil make a poſſeſſio fratris, as Moyle ſaith. And in our caſe this con-

Attornment.

this Confirmation is void in all, because Non sunt concurrentes ii qui in hac parte concurrere debuerant: And it is an entire Act, and cannot be avoyded in part, and stand for the residue, and the Presentee comes in in the right of the Heire for which he shall avoyd it, &c. Popham contrary, It is to be here considered, if the Ordinary hath Interest in the Church by this Lapse, or only an authority, for if he hath an Interest, then it will follow, that every one of his Successors shall be bound by his Confirmation, and also their Presentees: It hath been objected, that there ought to be a full and entire Patron who makes such a Lease, otherwise it is void: But that is not so, as if the Patron be Tenant for life, his Lease or Confirmation shall not be void in all, but shall be good during his life, which see 31 E. 3. Grants 61. and 19 Eliz. 356. A Parson makes a Lease for forty yeares, the Bishop being Patron and Ordinary confirmes it, the Patron dyeth, the Bishop presents, and afterwards is translated, this Lease shall stand during the life of the Bishop, and of the new Incumbent who found the Church charged, and then such Lease may be good for part, and void for part, see for the same, 2 E. 3. 8. If the Advowson of a Church be appropriated unto a Prior and his Successors, if afterwards the wife of the Grantor be endowed of it, and present her Clerk, the Church is become dis-appropriated during the life of the Wife, but afterwards shall stand, vi. the case cited to the contrary, 29 Eliz. in the case of the Earle of Bedford, c. 7. part 8. At the beginning the Patron was not restarined to any time to present his Clerke, but the six months was appointed at the instance and suit of the Ordinaries by a Canon, confirmed in the councell of Lateran, before which time, the Ordinaries had not any Lapses, but after the said Canon, they had an Interest in the Church, and this appeareth in the Register: And see F.N.B. 37. f. that after the Ordinary is entituled to Lapses. The Plaintiff in a Quare Impedit cannot have a Ne admittas, for now the Ordinary hath an Interest: And if the Bishop hath Title to present by Lapse, and before Presentment he dyeth, so as his temporalties comes to the King, the King shall present, which proves that it is an Interest, and the Civilians call it Interest, caducum & conditionale: And in our case the confirmation of one Coparcener shall binde the other Coparceners, in Nativo habendo, shall binde them all, and the villaine shall be free for ever. And it was moved, also that if an usurper, or the Clerk who is in by him shall avoid this clause, and by the words of the Statute of West. 2. Si tempus semestre transierit per impedimentum alicujus, ita quod Episcopus Ecclesiam conferat, & verus Patronus ea vice præsentationem suam amittat, adjudicentur damna ad valorem Eccleſiæ pro duobus annis; Therefore what the Patron loseth, the Ordinary hath the same, therefore it is an Interest, and in liew of that losse the Statute gives damages to the Patron, &c. And the Case was adjorned to be further argued at another day, &c.

Pasch. 33. *Eliz. Rot.* 392. In the Kings Bench.

CCCXVIII. Pet *and* Baldens *Case.*

IN a prohibition the Plaintiff declared, that whereas Michael Pett was seised of diverse Lands, and made his Will, by which he made the Plaintiff his Son his Executor, and thereby devised unto A his Wife one hundred pounds, in consideration and recompence of her Dower of all his Lands, & dy- Prohibition.

ed, and the said A took to Husband the Defendant: And that after betwixt the Plaintiff and Defendant, colloquium quiddam habebatur, &c. upon which conference and communication, the Defendant in consideration that the Plaintiff promised to pay to him the said one hundred pounds, promised to make to him a discharge of the said one hundred pounds, and also of the Dower of his Wife, and shewed further, that notwithstanding that the said Pett was ready, and offered the said one hundred pounds, and Dower also, yet, &c. Upon which there was a Demurrer in Law; It was moved by Tan. that here is not any cause to have a prohibition, for the agreement upon the communication is not any cause, for it doth not appeare that it was performed. Coke, A Prohibition lyeth, for the Wife cannot have both, money, and Dower, for that was not the meaning of the Devisor; and therefore it hath been holden, that if a man deviseth a Terme for years to his Wife, in satisfaction and recompence of her Dower, if shee recovereth Dower, she hath lost her Terme; Also here is modus and conventio which alters the Law, scil. mutuall agreement: So if the Parson and one of the Parishoners agree betwixt them that for forty shillings per annum, he shall retaine his Tythes for three years, &c. as it was in the Case betwixt Green and Pendleton, &c. it is good.

Mich. 32. & 33. *Eliz.* In Banco Regis.

CCCXIX. Martingdall *and* Andrewes *Case.*

Action upon he case for stopp in Way.

In an Action upon the Case, the Plaintiff declared, that one Mildmay was seised of a House in A, and that he and all those whose estate, &c. time out of minde, &c. have had a way over certaine Lands of the Defendants called C. pro quibusdam averijs suis, and shewed, that the said Mildmay enfeoffed him of the said House, and that the Defendant stopt the said way, to his damage, &c. And it was found for the Plaintiff, and it was moved in Arrest of Judgment, that the title to the way is not certainly set forth, i. e. pro quibusdam averijs suis, quod omnes Iusticiarii concesserunt, But Gawdy Justice conceived, that the same was no cause to stay Judgment: For it appeareth to us, that the Plaintiff hath cause of Action, although that the matter be incertainly alleadged, and of this incertainty the Defendant hath lost the advantage, having surceased his time by pleading to it, as 20. E. 3. Trespasse for taking and carrying away of Charters, the Defendant pleaded Not guilty, and it was found for the Plaintiff to the damage, &c. And Error was brought, because the Plaintiff had not set down in his Declaration, the certainty of the Lands comprized in the Charters: But non allocatur, for the Defendant ought to have challenged that before, and also 47 E. 3. 3. In a Writ of Covenant the Plaintiff declared of a Covenant, by which the Defendant covenanted with the Plaintiff to assure to him all his Lands and Tenements which he had in the Counties of Glouceſter and Lincolne, and declared, that at a certaine day he required the Defendant to make him assurance of all the Lands, &c. And the Writ of Covenant was generall, quod teneat coventionem de omnibus terris quod habet in, &c. And it was objected (as here) that the Writ wanted certainty, as how many Acres, or such Manner, but non allocatur, for here the Plaintiff is not to recover Land, but only Damages, and the Writ was awarded good. Fenner Justice, the Cases are not like to the Case at Bar, for in the said Cases, the certainty is not needfull, but for the taring of the Damages; but here, the certainty of the number of the Cattell is part of the title.

Mich.

Mich. 32. & 33. *Eliz.* In the Kings Bench.

CCCXX. Beale *and* Taylors *Case*.

Upon Evidence to a Jury, It was holden by Gawdy and Clench Justices, that if a Leale for yeares be made, and the Lessor covenants to repaire during the Terme, if now the Lessor will not doe it, the Lessee himself may doe it, and pay himself by way of Retainer of so much out of the Rent, which see 12 H. 8. 1. 14 H. 4. 316. A Lease for years by Indenture, and the Lessor covenants to repaire the Houses, and afterwards the Lessor commands the Lessee to mend the Houses with the Rent, who doth it accordingly, and expends the Rent in the charges, &c. So 11 R. 2. Bar, 242. The Lessor covenants, that the Lessee shall repaire the Tenements when they are ruinous, at the charge of the Lessor; In debt for the Rent, the Lessee pleaded that matter, and that according to the Covenant, he had repaired the Tenements being then ruinous with the Rent, and demanded Judgment, if action, &c. and good: Fenner Justice contrary, for each shall have action against the other, if there be not an expresse Covenant to do it. Quære, If the Lessor covenant to discharge the Land leased, and the Lessee of all Rents, Charges, issuing out of it, If a Rent-charge be due, if the Lessee may pay it out of his own Rent to the Lessor, ad quod non fuit responsum.

Leases.

Retainer of Rent.

Mich. 32. & 33 *Eliz.* In the Kings Bench.

CCCXXI. Offley *and* Saltingston, *and* Paynes *Case*.

Offley and Saltingston, late Sheriffs of London, brought an action upon the Case against Pain, because that he being in Execution under their custody for fifty three pounds, in which he was condemned at the Suit of one Spicer, made an escape, the debt not satisfied, by reason whereof they were compelled to pay the money; The Defendant confessed all the matter, but further pleaded, that after the Escape, Spicer had acknowledged satisfaction (being after the Escape) upon Record of the summ recovered, upon which there was a Demurrer: Owen Serjeant argued that the acknowledging of satisfaction, being after the Escape, was not any Plea, for when the Plaintiffs, Sheriffs, have paid the money recovered, there was no reason that Spicers acknowledging satisfaction should stop the Sheriffs of their Remedy against Payne: It was holden by the Justices, that the Plaintiffs in this Action ought to shew, that they had been impleaded by him who recovered, for they cannot have this Action before they are sued. For perhaps the Plaintiffs who recovered but be contented to hold themselves to the Defendant, and to be satisfied by him; It was said by Glanvill Serjeant, that by the Escape the Debt was cast upon the Sheriffs, and the Defendant discharged: And that it was the Case of Sir Gervas Clyfton, who being Sheriff suffered him who was in Execution, and in his custody to goe and see a Play, and the same was adjudged an Escape, and the party could not be in Execution againe: And then he said, that this acknowledgement of satisfaction could not be any Bar to the Plaintiffs: At another day the Case was moved againe. And then it was the clear opinion of the whole Court, that the Action was maintainable, although that the Plaintiff in the first Action had acknowledged satisfaction: And it hath been adjudged here in this Court, in the Case betwixt Hill and Hill, that notwithstanding such satisfaction, that the action lyeth. See F.N.B. 130. b. for the payment after doth not take away the Action, but mittigate the damages onely, for the Act of a third person shall not take away an Action once vested.

Escape.

Mich.

Mich. 32 & 23 *Eliz.* In the Kings Bench.

CCCXVII. Greenliff *and* Bakers Case.

Assumpsit.

THe Plaintiff declared, that whereas he was bound to the Defendant in an Obligation of forty pounds for the payment of twenty pounds, the Defendant the second of No. after, in consideration that the Plaintiff at the Request of the Defendant had paid the said twenty pounds without suit at Law, promised to deliver to the Plaintiff before such a day, an Obligation by which one A. was bounden to the Defendant in forty pounds, with a Letter of Attorny to demand the same of the said A. and to sue for it in the name of the Defendant which he had not done, and in that matter the Plaintiff had Judgement, and thereupon the Defendant brought a Writ of Error; First here is not any consideration; for the payment of the money is no more then he ough to doe, and which he was compellable to doe, &c. Secondly, the same is no benefit to the Plaintiff, but only a matter of charge, to sue the said Bond against A. Thirdly upon the Venire facias, the Sheriff returned but twenty three Jurors. As to the first Error it was the opinion of Gawdy and Fenner Justices, that here is not any consideration, for the Defendant hath not any benefit by it, and the Plaintiff doth no more then he ought to doe, and the payment was in respect of the Debt, and not of the Defendants Request. And by Gawdy upon this promise, an action doth not ly, for the Plaintiff is not to have any benefit by it, but travell. Fenner contrary, and that the action lyeth for that; as to the third Error, the same is helped by the Statute of 32 H. 8. and the Statute of 18 Eliz. of imperfect and insufficient returne of any Sheriff: Fenner, Not only the returne is naught, but also the Pannell is insufficient. And it was moved by Tanfeild, that it was adjudged in this Court, Pasch. 25 Eliz. Betwixt Cook and Huet, that where A was bounden to B in forty pounds, B promised to A. that if A would pay the mony without suit he would deliver him the said Bond, by which he is bound to the said B., and it was holden a good consideration, Quod fuit concussum per totam curiam, but that is not like to the case at Bar, and it was holden in the same Plea, That if the Obligor pay the duty at the day and place, that if the Obligee will not deliver the Bond; Yet the Obligor shall not have Detinue for it.

Mich. 32. & 33 *Eliz.* In the Kings Bench.

CCCXXII. Guilfords *Case.*

Indictment upon the Statute of 23 *Eliz.*

GUilford was endicted upon the Statute of 23. Eliz. cap. 1. for withdrawing diverse persons, her Majesties Subjects from the Religion established in England to the Roman Religion; and to promise obedience to the Church of Rome, and for that he himselfe was withdrawn from the obedience of the Queen. Coke took Exception to the Endictment, because that the Indictment was not found within the yeare after the offence committed. In the said Act, there is a Proviso, That all offences against the Act, shall and may be enquired of within the yeare and day after the offence committed. Popham Attorney Generall, This case is not within that Proviso, but doth depend upon other Statutes before viz. 1. 5. & 13 Eliz. touching the acknowledging of her Majesties supreame Government in causes Ecclesiasticall, or other matters touching the service of God, or coming to Church, or establishing of true Religion within this Realme, shall and may be enquired as well before the Justices of the Peace, as other Justices named in the said Statute

tute, within one yeare and a day after such offence committed: And he said, these words in the Proviso refer only to such offences contained in the said Act, which toucheth the supremacy and causes Ecclesiasticall, &c. And such offences ought to be enquired within the yeare and day; But this Indictment here doth consist upon other matter, for with-drawing himselfe from the obedience of the Queen, which is an offence out of the compass of the said Proviso, and therefore the enquirie of it not restrained unto any time, and the Statute of 13 Eliz. extends to Bills, Writings, Instruments, &c. and not to the words (with-drawing by words) which is supplyed by 13 Eliz. (with-drawing by other meanes) and the restraint of Enquiry at the time, goes to the hearing of Masse, and saying of Masse, and not (repairing to the Church) but as to with-drawing, the same is at large, not restrained by that Statute: And he said, that this Indictment doth consist upon many offences, some, to offences within the Proviso, and as to those, the Indictment is void: Some to other offences, as Treason, the offence of with-drawing, the Enquiry of which is not restrained, and therefore this Indictment shall stand: Also it was the intent of this Statute, not to restrain this Court, but only the Justices of Peace, for they are specially named, Coke, and he conceived that this word, touching, &c. did not extend to any thing contained in the Statute of 23. Eliz., but only to offences within the Acts of 1. 5. & 13 Eliz. which were incertaine before, also this Proviso is in the Disjunctive, against this or against the Acts of 1. 5. or 13 Eliz. so as that which followes is to be applyed to the last Disjunctive, and not to the whole sentence, and alwayes when a thing is named certain, and after generall things, the words subsequent shall be referred to the generall words, and not to that which is certaine. Also, if (touching, &c.) doth refer to this Statute, the sentence would have begun with it, but here it begins with the Supremacy, of which nothing is spoken in this Statute, and therefore it ought to be referred to the Statute which begins with it, and that is 1. Eliz. and then it shall be preposterous to come after 23 Eliz. and these words (shall and may) ought to be so construed (shall) is restrictive of it selfe, and (may) shall be referred to that which was restrained before, as the proceedings upon the Statute of 1 Eliz. cap. 2. were restrained to the next Sheriffs, and he conceived, that this Court is as well restrained to Time as any other Court, for the words are, as well before Justices of the Peace, as before other Justices named in the said Statutes, and in the Statute of 5 Eliz. This Court is especially named: Wray, this Proviso begins with Justices of the Peace, therefore it doth not extend to offences which are Treason, and the meaning of this Statute of 23. Eliz. was to enlarge the Statutes of 1. & 5 Eliz. for where the offence against the Statutes before, was to be enquired at the next Sessions, and the other within six moneths, now by this Statute it may be enquired at any time within the yeare and day, but it doth not extend to restrain the proceedings against offences of Treason, for the words of the Statute are, That such offences shall be required before Justices of Peace within a year, &c. But in the next clause, that the Justices of Peace against all offences against this Act, but Treason by which it appeareth, that no offences are restrained to time, but those which Justices of the Peace have authority to heare, and determine, and that is not Treason: Gawdy to the same purpose: For all the Proviso is but one sentence, and there the whole shall be referred to spirituall offences, as the not coming to Church, &c.

Mich.

Mich. 32. *&* 33. *Eliz.* In the Exchequer, Error.

CCCXXIII. Fillcoks *and* Holts *Case.*

IN an Action by Fillcoks against Holt, Administrator of A. the Plaintiff declared, how that the Husband of the Defendant, who dyed intestate, was endebted to the Plaintiff in ten pounds by Bill, and that the Defendant in consideration, that the Plaintiff would permit the Defendant to take Letters of Administration, and give to her further day for the payment of the said ten pounds, promised to pay the said ten pounds to the Plaintiff, at the day: And upon a Writ of Error brought in the Exchequer, upon a Judgement in the Kings Bench, in that case, It was assigned for Error, that here is not any consideration, for by the Law shee is to have Administration, being wife of the Intestate, and as to the giving of further day for the payment of the ten pounds, the same will not make it good, for it doth not appeare that shee was Administratrix at the time of the promise made, and then shee is not chargeable, and then, &c. And such was the opinion of the Court. And it was said by Periam Justice, and Manwood cheife Baron: That the Bishop might grant Letters of Administration, to whom he pleased, if he would forfeit the penalty limitted by the Statute: Also it was said, where an Executor or Administrator is charged upon his own promise; Judgement shall be given, de bonis proprijs, for his promise is his own Act.

Mich. 33. *Eliz.* In the Kings Bench.

CCCXXIV. Adams *and* Bafealds *Case.*

Action upon the Case.

AN Action upon the Case was brought, and the Plaintiff declared, That where such a one, his Servant, departed his service without cause or license, the Defendant knowing him to be his servant, did retain him in his Service, and so kept him. Tanfeild, The Action doth not lye, for if my Servant depart out of my service, and another doth retain him, an action doth not lye at the Common Law, if he doe not procure him to leave my service, and afterwards retain him, or immediatly taketh him out of my service. And this Action is not grounded upon any Statute, See 11 H. 4. 176. 47 E. 3. 14. 9 E. 4. 32. Gawdy, The Action lyeth, for here is damage and wrong done to the Plaintiff. Fenner contrary, For the wrong is in the departure, and not in the Retainer, and upon the Statutes it is a good Plea to say for the Defendant, that the party was vagrant at the time of the Retainer, and the (scions) doth not alter the matter.

Mich. 32. *&* 33. *Eliz.* In the Kings Bench.

CCCXXV. Nash *and* Mollins *Case.*

Prohibition.

Tythes.

NAsh and Usher sued a Prohibition against Mollins, for that the Defendant had libelled against them in the spirituall Court, for Tythes of Wood, growing in Barking Parke in Essex; The other did surmise that the Lands were parcell of the possessions of the Prior and Covent of Cree Church, and that the said Prior and his Successors, time out of mind, &c. had held the said Lands discharged of Tythes, and held them so, at the time of the Dissolution, &c. and the other part traversed it, whereupon they were at

at Iſſue, if the Prior, &c. held the Land diſcharged, tempore Diſſolutionis, &c. And now on the part of the Plaintiff in the Prohibition, certain old perſons were produced, who remembred the time of the Monaſteries, and that they did not pay any Tythes then, or from thence: Exception was taken to the ſuggeſtion by Coke, That here is nothing elſe then a Preſcription, de non decimando, for here is not ſet forth any diſcharge, as compoſition, unity of poſſeſſion, privilege of order, as Templarii Hoſpititarii, &c. Fenner Juſtice: Spirituall perſons may preſcribe in non Decimando, for it is not any prejudice to the Church: Wray, Although it is not ſet down the ſpeciall manner of the diſcharge, yet it is well enough, for we ought to take it that it was by a lawfull meanes, as compoſition, &c. or otherwiſe: For the Statute is, That the King ſhall hold diſcharged as the Abbot, &c. and we ought to take it, that it was a lawfull diſcharge of Tythes, tempore diſſolutionis: And afterwards the Jury found for the Plaintiffs in the Prohibition: But no Evidence was given to prove, that the Defendant did proſecute in the ſpirituall Court, contrary to the Prohibition.

Mich. 32. & 33. *Eliz.* In the Kings Bench.

CCCXXVI. Shelldons *Caſe.*

Indictment upon the Statute of 23 *Eliz.*

Shelldon, Talbot, and two other, four perſons in all, were indicted upon the Statute of 23 Eliz. of Recuſancy, the words of the Indictment were, Quod illi nec eorum uterque venerunt, to any Pariſh Church, &c. It was moved by Atkinſon, That the Indictment is not good, for uterque doth refer unto one of them, and not where they are many, as here, and ſo is an inſenſible word, and ſo upon the matter there is no offence layed to their charge. And the Juſtices doubting of it, demanded the opinions of Grammarians, who delivered their opinions, that this word (uterque) doth aptly ſignifie one of them, and in ſuch ſignification it is uſed by all Writers: Gawdy, I conceive, that the opinions of the Grammarians is not to be asked in this caſe; But I agree, that when an uſuall word in our Law comes in queſtion, for the true conſtruction of it, then the opinion of Gramarians is neceſſary: But (uterque) is no unuſuall word in our Law, but hath had a reaſonable Expoſition heretofore, which we ought to adhere unto, which ſee 28 H. 8. 19 Three bound in an Obligation: Obligamus nos & utremque noſtrum, and by the whole Court (uterque) doth amount to quilibet: And ſee 16 Eliz. Dyer 337, 338. Three Joynt-tenants in Fee, and by Indenture Tripartite each of them covenanteth and granteth to the others, & eorum utrique, to make aſſurance, and there it was holden that the word (uterque) doth amount to quilibet: Wray, Admit it ſhall be ſo taken in a Bond, yet it ſhall not be ſo taken in an Indictment: As if a man make a Leaſe for years rendring Rent payable at the day of Saint Martin, although there be two dayes of Saint Martin in the yeare, yet the reſervation is good, and the Rent ſhall be taken payable at the moſt uſuall day of Saint Martin there in the Country: But in an Indictment if an offence be layd to be done on Saint Martins day, without ſhewing which in certain, it is not good: Fenner. The word uterque is matter of ſurpluſage, and therefore ſhall not hurt the Indictment.

Expoſition of words.

Mich. 32. & 33. *Eliz.* In the Kings Bench.

CCCXXVII. Blunt *and* Whitacres *Case.*

Error. A Writ of Error was brought upon a Judgement given in the common Pleas in a Replevin, where the Defendant did avow as Fermor of the Mannor of F in the County of Berks, to Saint Johns Colledge in Oxford, and layed a Prescription there in him and his Fermors to distraine for all Amercements in the Court of the said Mannor, and shewed that the Plain-
Amercement. tiff in the Replevin was presented by the Homage, for not repayring of a House being a customary Tenant of the said Mannor, according to a paine imposed upon him at a former Court for which he was amerced by the Steward to ten shillings, and was also presented for not ringing of his Swine, for which he was amerced three shillings four pence, and for these Amercements he distrained: And upon Nihil dicit Judgement was given for the Avowant to have return, upon which a Writ of Error was brought: And Error assigned, in that there is not any Prescription layed in the Avowry, for the Lord to amerce the Tenants, and of common Right, he cannot do it, See 48 E. 3. And such Amercement is extortion, for the Lord cannot be his own Judge, and therefore he ought to enable himselfe to distrain by Prescription; Another Error, because the Fine is layed to be assessed by the Steward, whereas by the Law it ought to be by the Suitors, for they are Judges, and not the Steward; Another, because, that in the Avowry it is set down, quod præsentatum fuit, that he had not repaired a certaine House, but he doth not say, in facto & categorice, &c. that he had not repaired, for that is matter traversable, 4. here is no offence, for a Copy-holder is not bound to repaire by the common Law, if it be not by Prescription, for he cannot have House-boot upon the Land as a Termor may if it be not alleadged a custome: Fenner, The Steward may assesse Fines for a contempt, but not Amercements if not by Prescription. Gawdy, The Lord of a Mannor cannot assesse Amercements for a Trespasse done to himselfe upon his own Lands, but otherwise it is of a common Trespasse, or a Trespasse done in the Land of another, but for the Distresse, he ought to prescribe, and the Judgement was reversed.

Pasc. 29 *Eliz. Rot.* 121. In the Kings Bench.

CCCXXVIII. Page *and* Fawcets *Case.*

Error. Error was brought upon a Judgement given in Lynn, where by the Record it appeareth, that they prescribe to hold Plea every Wednesday, and it appeared upon the said Record that the Court was holden, 16. Feb. 26. Eliz. which was dies Dominicus, & that was not assigned for Error in the Record, but after in Nullo est erratum pleaded, it was assigned at the Bar: And Almanacks were shewed to the Court in proof of it, and it was holden clearly to be Error, but the doubt was, if it should be tryed by Jury, or by the Almanacks, and it was said, that the Justices might judicially take notice of Almanacks, and be informed by them, and that was the Case of one Robert in the time of the Lord Catline, and by Coke, so was the Case betwixt Galery and Bunbury, and afterwards the Judgement was reversed.

Trin.

Trin. 33 *Eliz.* In the Kings Bench.

CCCXXIX. Geofries *and* Coites *Case.*

IT was found by speciall Verdict, that one Avice Trivilian was Tenant for life, the remainder to her Son in tail, the Remainder over; Tenant for life, and he in the Remainder in tail, make a Lase for life, the Remainder for life rendring Rent; Tenant for life dyeth, he in the Remainder dyeth, and his Son accepteth of the Rent of the Tenant for life in possession, who dyeth, The issue in tail entreth, he in the Remainder for life entreth, &c. And it was conceived that this acceptance of the Rent of the Lessee for life doth affirme also the Remainder: See Litt. Sect. 521. and such was the opinion of Gawdy and Fenner Justices.

Pasc. 33. *Elix.* In the Kings Bench.

CCCXXX. *The Lord* Mordant *and* Vaux *Case.*

THe Lord Mordant brought an Action of Trespas against George Vaux, and declared of a Tresplle done in quodam loco, called N, parcell of the Manner of Hawarden: The Case was, William Lord Vaux was seised thereof, and thereof levyed a Fine to the use of the Lord Vaux, which now is, for life, and after his decease to the use of Ann and Muriel Daughters of the Lord Vaux and their Assignes, untill Ambrose Vaux should returne from the parts beyond the Seas, and should come to the age of twenty one years, or dye, if they should so long live; And after the returne of Ambrose from beyond the Seas, and the age of twenty one years, or death, whichsoever of the said dayes or times should first happen, to the use of the said Ambrose and the heires of his body begotten, with diverse Remainders over: Ambrose returned, and 31. Eliz. before he came of full age (for it is not pleaded that he was of full age) levyed a Fine to the use of George Vaux, the Defendant in taile, with diverse Remainders over: Afterwards the Lord Vaux being Tenant for life, enfeoffed the Lord Mordant in Fee, upon whom the said George Vaux entred for a forfeitnre, upon which Entry, the Lord Mord. brought the Action: Buck. argued for the Plaintiff. Amb. Vaux had nothing in the Lands in question, untill his returne from beyond the Seas, and his full age, & the estate doth not begin untill both be past, and he said, that no use did rise to Ambrose untill the time incurred, for the time of the beginning is uncertain and upon a Contingent, as 13 Eliz. Dyer 301. 301. A makes Feoffment in Fee to the use of himself for life, & after to the use of B. who he intendeth to marry until the issue which he shall beget on her shall be of the age of twenty one years, and after the issue shall come of such age, then unto the use of the said B, during her Widdow-hood, the Husband dyeth without issue, the wife entreth, and her Entry holden lawfull. But Error was brought upon it; And also Calthrops case was cited to the same purpose, 16 Eliz. Dyer, 336. This estate limitted to Ambrose doth refer to the estate limitted to Muriell and Ann, and not to the time, for ever the first estate is to be respected, as 23. Eliz. Dyer, 371. He in the Remainder in Fee upon an estate for life, deviseth it to his Wife, yeilding and paying during her naturall life yearly twenty shillings, and dyeth, living Tenant for life, the Rent shall not begin untill the Remainder falleth: So as the generall words refer to the beginning of the estate, although the words imply that the Rent shall be paid presently: And see also such construction. 9 Eliz 261. A lease was made for thirty years, and four years after the Lessor makes another Lease by these words, Nos dictis, 30.

annis finitis, dediſſe & conceſſiſſe, &c. Habend. et tenend. a die confectionis præſentium, termino prædict. finito, uſque terminum, &c. And although, prima facie, the beginning of this Terme ſeems incertaine, yet the Juſtices did reſpect the former eſtate, and ſo the Leſſee hath the Intereſt of the Terme from the making of the Deed, but no eſtate untill the firſt Terme expire: When Ambroſe before his age of twenty one years levying a Fine, the Fine ſhall not bind the Feoffee, for it enures only by way of concluſion, and ſo binds parties and privies, but not a ſtranger: And the party needs not to plead againſt this Fine, quod partes, to the Fine, nihil habuerunt, for that appeareth upon their own ſhewing: Wiat contrary; The ſtate of Ambroſe accrues and riſes when any of the ſaid times come, firſt full age, returne, death, for the words are, And after the returne of Ambroſe from beyond the Seas, and the age of twenty one years, or death, &c. This word (or) before (death) diſjoynes all, and makes the ſentence in the diſjunctive, and he cited a caſe lately adjudged in the Common Pleas: A Leaſe was made to Trewpeny and his Wife for one hundred years, if he and his wife, or any child or children betwixt them begotten ſhould ſo long live, the Wife dyed without Iſſue, the Husband held the Land, &c. for the Diſjunctive before (child) made the ſentence Diſjunctive. Gawdy Juſtice, That had been Law if no ſuch word had been in the Caſe. And Wiat ſaid, That although the returne be incertain, yet it is certain enough that he ſhall come to the age of twenty one years, or dye: And alſo this is by way of uſe, which needs not to depend upon any eſtate, and if the Remainder ſhall veſt preſently upon his returne, then it would be doubtfull, what remainder it is, if it be a Remainder depending upon the eſtate for the life of Ann and Muriell, or for years, i. e. untill Ambroſe ſhall come of the age of twenty one years: But be it incertaine, yet the Fine is good, for here is a Remainder in Ambroſe, and both are but particular eſtates, and there is not any doubt, but that one may convey by Fine, or War by Fines ſuch Contingent uſes, for which ſee the Statute of 32 H.8. All Fines to be levyed of any Lands intailed in any wiſe to him that levyeth the Fine, or to any his Anceſtors in poſſeſſion, Reverſion, &c. which word (uſe) goes to contingent uſes, for at the time of the making of that Statute, there was no other uſe. Fenner Juſtice remembred the Caſe adjudged, M. 30. 31. Eliz. betwixt Johnſon and Bellamy, which ruled this Caſe: Gawdy Juſtice, here is a a certainty upon which the Remainder doth depend, i. e. the death of Ambroſe, but the Caſe had been the more doubtfull, if no certainty at all had been in the Caſe: Atkinſon contrary; Here the Lord Vaux is Tenant for life, the Remainder to George in tail, now when the Lord Vaux levyes a Fine, this is a forfeiture, and then the Entry of George is lawfull: It hath been objected on the other ſide, that his Remainder was future and contingent, and not veſted, therefore nothing paſſed to George by Ambroſe. The words are (quouſque Ambroſe ſhall returne.) This word (quouſque) is a word of Limitation, and not of condition, and then the Remainder may well riſe when the Limitation hapneth. It hath been ſaid, that this Remainder is contingent, and then the Remainder which is to veſt upon a contingency, cannot be granted or forfeited before that the contingent hapneth: And he cited the Caſe of 14 Eliz. 314. Dyer. A Fine is levyed to A to the uſe of B for life, the Remainder to E in tail, the Remainder to B in Fee, Proviſo, That if B ſhall have iſſue of his body, that then after ſuch iſſue, £ 500 l. paid to &c. within ſix moneths after the birth of ſuch iſſue, the uſe of the ſaid Lands, after the death of the ſaid B, and the ſaid ſix moneths expired, ſhal be to the ſaid B and the heirs of his body: And it was holden, that before the ſaid contingent hapneth, B had not any eſtate tail, for there it was incertain if the ſaid contingent would happen, but in our caſe, the contingents or ſome of them will happen, or run out by efflurion of time, and that makes the Remainder certain in Ambroſe: And

he

he also argued, that the Limitations are severall, by reason of the Disjunctive, and the last part of the sentence, and that the said sentence is in the Disjunctive appeareth by the subsequent words (which of the said dayes or times shall first happen) And then the return of Ambrose (for that first happened) vests the Remainder in him, and therefore the Plaintiff ought to be barred. Buckley contrary: The estate of the Daughters doth depend upon a Copulative, i. e. the returne of Ambrose and his full age, and both is but one Limitation; it is clear, that the first Limitation is upon a contingent, and the Remainder cannot vest untill both are performed, and as to that which hath been said, that here is a certain Limitation, i. e. the returne of Ambrose, 18 Eliz. the Case was, Lands were given to Husband and Wife, the Remainder to such of them as should survive the other, for years, the Husband makes a Lease for years and dyeth, it was holden, that although the Limitation was upon a certaine estate, yet because it is not known in which of the parties the estate secondly limited shall begin, the Lease is void; So here it is not certainly appointed when the estate limited to Ambrose shall begin, upon the return, full age, or death of Ambrose, and he said, that here are but two times of Limitation, first returne and full age, second death, returne and full age determines the estate of the Daughters, and also the death, if it shall first happen, and if these three times shall be construed in the Disjunctive, the same would overthrow the estate of the Daughters, which is an estate for years determinable, upon the death of themselves or Ambrose, the last words of the Limitation doth not distinguish or disjoyne it, but respects the estate precedent. And by Clench Justice, If the use limited to Ambrose, shall depend only upon the Limitation of his death, the same should be void, for then he should not be in esse to take, but the other Justices were of a contrary opinion, and that the use is good, 7 H. 4. Gawdy, Although that here be three things, yet but two times, for the words are not (Dr) at such of the said dayes or times, as shall first happen, for that would alter the case: but here these words ought to be intended as if they were spoken before in the Limitation of the estate to the Daughters, and cannot divide the former Limitation: and he said, that if by reason, that the Limitation upon the death, which is certaine, it shall vest in Ambrose presently, then if after the other Limitation shall fall, then his Remainder which vested in him upon the said certaine Limitation should be devested, and should now accrue to him upon the other Limitation, which should be absurde and inconvenient, &c. It was adjorned.

Trin. 32. *Eliz.* In the Kings

CCCXXXI. Thomas *and* Wards *Case.*

Ejectione firmæ.

IN Ejectione firmæ, by Thomas against Ward, upon a Lease made to him of the Manor of Midleton Cheney by one Chambers, the Defendant pleaded, that long time before the Lesor of the Plaintiff had any thing, the Bishop of Rochester was seised, and leased the same to the Defendant: the Plaintiff by Replication said, that the said Lease was upon condition, viz. The Lessee by the Indenture of the said Lease, did covenant that he would not put out, or disturbe any of the Tenants inhabiting within the said Manor out of their Tenancies, doing their duties according to the custome of the said Manor; and shewed, that the Defendant had put out one Ann Green a Tenant dwelling there upon a Tenement parcel of the said Manor, late in the possession and occupation of the said Ann, and that the Bishop had re-entred for the condition so broken, and made a Lease to the Lesor of the Plaintiff, upon which Replication, the Defendant hath demurred in Law:

Tanfeild,

Tanfeild argued for the Defendant, that the Bishop had not cause to re-enter, for there is not any condition in the Case, but only a Covenant, for it comes in only on the part of the Lessee, and they are words of Covenant only, whereas every condition ought to be the words of the Lessor, and the Bishop hath sufficient remedy by Action of Covenant: But if the words had been indifferent and absolute without depending on the Lessor or Lessee, then it had been otherwise, as 3 E. 6. Dyer, 65. Non licebit, to the Lessee, are, concedere, vel vendere statum vel terminum, without the Licence of the Lessor, under paine of forfeiture, the same is a good condition, but here it is meerly a Covenant, and it cannot be both: Haughton. Although the words sound in Covenant, and be the words of the Lessee, yet the Lease being made by Indenture, the same is the Deed of both, and every word in it is spoken by both parties, and although that he may have an Action of Covenant, yet he cannot thereby overthrow the Lease, as by Entry, by condition broken, and yet by the words it seems the meaning of the Indenture was, that by the breach of this Covenant, the estate should be defeated, for so are the words, sub pœna forisfactar. And here by way of Action he cannot have the benefit of the whole Covenant, and therefore he shall have it by way of condition: And see the Case betwixt Browning and Peston, Plow. 132. If it happen the Rent to be behind, that then the Lessee Covenants, that although the Rent be not demanded, that the said Lease should be utterly extinct, void, and of no effect, and 24 Eliz. there was a case betwixt Hill and Lockham, where by the Indenture of Lease, the Lessee Covenanted to grind all his Corn at the Mill of the Lessor, and afterwards in the end of the said Indenture, the Lessee covenanted to performe all the Covenants, sub pœna forisfactar. and by the opinion of the whole Court, the same was a condition: And see 21 H. 6. 51. where in an Obligation where A was bound to B, the condition is written in this manner, Prædict. B. vult & concedit, That if the said A doth stand to the Arbitrament of such a one that then, &c. the same is a good condition, although they are the words of the Obligee, and the Deed of the Obligor, and so here is a good condition. And such was the opinion of Wray and Gawdy, and Fenner did not contradict it: Wherefore Tanfeild said, Admit here it is a condition, yet here is not any breach of it sufficiently set forth, for the breach is assigned because he had put out a woman, unam tenentem, & inhabitantem, out of certain Lands parcell of the said Manor, late in the possession and occupation of the said woman, and that might be, that shee was but Tenant at Will, and the Covenant doth refer only to Copy-holders: And it may be also, that she had disseised one of the Tenants of the Manor, in which case, the putting out of such a Tenant being in by wrong, is no breach of the condition. Also it is not averred in facto, that Ann was Tenant of any part of the Manor: Also the Replication is, That the said Defendant had ousted the said Ann, where she had done her duty, fecit debitum suum, before the Ouster, and that might be, that she had done her duty once, but not after, and therefore he ought to have said, that she had done her duty alwayes, before her putting out, and this word (duly) being single, is too generall, for it may be understood of curtesie, where the words in the Indenture are (Doing their duty according to the custome of the Manor.) And also it might be, that Ann Green was Tenant and Inhabitant, but was not put out of the Land which was parcell of the Manor. And Wray said, that these Exceptions were incurable: And therefore Judgement was given against the Plaintiff.

Mich.

Mich. 31, *&* 32 *Eliz. Rot.* 414. in the Kings Bench.

CCCXXXII. Harvy *and* Thomas *Case.*

THe Case was, Husband and Wife seised of Lands in the Right of the Wife, the Husband alone makes a Lease by word for years: Afterwards the Husband and Wife levy a Fine, and after the Wife and Husband both dye; It was holden clearly by the whole Court, that the Conusee should avoid the Lease. Leases.

Trin. 32. *Eliz. Rot.* 314. In the Kings Bench.

CCCXXXIII. Sly *and* Mordants *Case.*

IN an Action upon the Case the Plaintiff declared, that whereas he was seised of certain Lands, the Defendant had stopped a Water-course, by which his Land was drowned, and found for the Plaintiff, It was moved in arrest of Judgement, that it appeareth upon the Plaintiffs own shewing, that the Plaintiff hath the Free-hold, and therefore he ought to have an Assize, but the same was not allowed, and therefore the Plaintiff had Judgement.

Trin. 33. *Eliz.* In the Kings Bench.

CCCXXXIV. Kensam *and* Redings *Case.*

THe Case was, That the Queen by her Letters Patents granted the sale of the Mannor of Brokley lying in W, and all the Lands, Pastures, Woods, Under-woods, and Hereditaments, parcell or appertaining to the said scite exceptis omnibus grossis arboribus, boscis & maremio, and further in the said Letters Patens there was a Proviso, that the Lessee should have sufficient House-boot, and Hedge-boot, &c. And if, notwithstanding the said Exception, the Lessee should have the Under-woods, was the question: And it was argued, that the Lessee should have subbois, i. e. Under-woods, for that is granted by expresse words, and the exception extends only grossis arboribus, for this word (grossis) in the exception extends to all that which followes: Gawdy Justice, If it were in the Case of a common person, its clear, that upon such matter the Under-woods are not excepted, 7 E. 6. Dyer, 79. A Lease is made of a Mannor except Timber and great Woods, the Under-woods shall passe. Fenner Justice, The Proviso, that the Lessee should have House-boot, shewes the Queens intent, that the Under-woods should not passe. Wray, If this word (bois) in the exception should not extend to Under-woods, it should be vain and signifie nothing, which should be hard in the Case of the Queen. Grants of the King.

CCCXXXV. *Trin.* 33 *Eliz.* In the Kings Bench.

IN an Action upon the Case the Plaintiff declared of Trover and of a Bag of mony, and the conversion of it, The Defendant pleaded, that the bag of mony was delivered to him as a pawne to keep untill A and B were agreed, which of them should have it, and pleaded further, that A and B were not yet agreed, who of them should have it, for which cause he kept it, absque hoc, that Trover and Conversion.

he

he converted it to his own use, upon which the Plaintiff did demur in Law; It was moved that the Conversion is never traversable. Wray, Generally Conversion is not traversable, but upon such speciall matter as is here: As if A lend money to B, and B delivereth a thing of the value to A in pawne, now the Conversion is traversable, see the same case, 4 E. 6. Br. Action upon the Case, 113. so here. Fenner agreed with Wray.

Mich. 33. *Eliz.* In the Kings Bench.

CCCXXXVI. *The Bishop of* Lincolne *and* Cowpers *Case.*

Prohibition. Tithes.

THe Bishop of Lincolne sued a Prohibition against Cowper, who had libelled against him in the Spirituall Court for Tithes out of the Manor of D; And the Bishop did suggest, that he and all his Predecessors had been seised of the said Manor, and that as long as it was in their possessions, had been discharged of Tithes, and shewed, that in the time of E. 6. the said Manor was conveyed to the Duke of Somerset in Fee, and afterwards was re-granted to the Bishop and his Successors; It was moved, That the Prescription was not good, because de non decimando: And admit that the Prescription be good, the same is interrupted by the seisin of the Duke of Somerset, and although that the Manor be re-assured to the Bishop of Lincolne, yet the Prescription is not revived: as Homage Ancestrell if it be once in a Forrain Seisin, although it be re-assured, yet it is not revived. But by Wray, Gawdy, and Fenner, The Prescription is good in the Case of a Spirituall person, but not in the case of a common person. And they all were cleare of opinion, that the Prescription is not gon by this Interruption, for Tithes are not issuing out of the Lands, neither can Unity of possession extinguish them, neither are they extinguished, by a release of all right of Land, &c. See for this Case, C. 11. part of his Reports in the Case of Pridle and Napper.

33. *Eliz.* In the Kings Bench.

CCCXXXVII. Dethick, *King of Armes Case.*

Indictment.

WIlliam Dethick, against Garter King of Armes, was indicted upon the Statute of 5 E. 6. for striking in the Church-yard: For that the said Dethick in Pauls Church-yard in London, struck I S, It was moved: If Cathedrall Churches be within the meaning of the Statute: The Court was clear of opinion, that they were. And afterwards the Defendant pleaded, that before the Indictment found, he was created and crowned by the Letters Patents of the Queen which he shewed, cheif and principall King of Armes, and it was granted by the said Letters Patents, that he should be called Garter, and that that name is not in the Indictment, and demanded Judgement: The Kings Attorney by Replication said, That by the Law of Armes and Heraldry, every one who is made King of Armes before he receives his Dignity ought to be led betwixt two Officers of Armes, by the Armes before the Earle Marshall of England, or his Deputy, and before him are to goe four Officers of Armes, whereof the one is to beare his Patent, another a Colar of Esses, the third a Coronet of Brasse double guilt, fourthly a Cup of Wine and his Patent shall be read before the Earle Marshall; And afterwards his Coronet shall be set upon his Head, & the Collar of Esses about his neck, & afterwards the Wine poured upon his Head: And that the Defendant had not received these Cerimonies, for which cause he is not King of Armes, nor to be called

Misnosmer in an Indictment.

upon which the Defendant did demur in Law; Broughton argued for the Defendant, and he took Exception to the Replication, because it is pleaded there, that solum legem heraldorum, Garter upon his Creation ought to receive, &c. of which Law, this Court cannot have Conusance, and therefore the Replication ought to be, scil. Solum legem Angliæ: If in Appeale the Defendant wage Battell, although that belongs unto Armes and Heraldry, yet it shall be pleaded according to the Law of the Land, and shall not speak of the Law of Armes; So if an Infant be made a Knight, and he to plead in discharge of his Ward-ship, he shall plead according to the Law of the Land, and yet the degree of a Knight belongs to the Law of Armes, 11 E. 3. Dower against the Earle of Richmond, who was also Duke of Brittaine, who pleaded to the Writ, That he was Duke of Britain, and not so named in the Writ, but the Court did not regard it, for they cannot have knowledge of it, so not here of the Law of Heraldry: Also this Court cannot write to the Heralds to certifie it, as they may to the Marshall of the King, or to the Bishop: But we have sufficiently shewed our matter, scil. That we have Letters Patents of the Queen, and that we were sworn in the said Office, and so we are King of Heralds by matter of Record, against which is pleaded only matter in defect of cerimony and circumstance which is not materiall. An Earle is created with the Cerimonies of putting a Sword broad wise about his body, and a Cap with a Coronet upon his Head; Yet the King may create an Earle without such Cerimonies: And may also create an Earle by word, if the same be after Recorded, when a Knight is made, Spurs ought to be put upon his Heeles, yet without such Cerimony such degree may be conferred to and upon another, for such Cerimonies are or may be used or not used at the Kings pleasure: Afterwards it was objected, that the same is but a name of Office, but not a name of Dignity. To which it was answered, that this word Coronamus, alwayes imports Dignity, and this is a Dignity and Office, as Earle, Marquesse, &c. Fenner Justice, The Patent is, Nomen tibi imponimus, and therefore (Garter) is parcell of his name: And therefore he ought to be indicted by such name; And it should be hard, to tye Estate and Degrees to Cerimonies. Gawdy was of opinion, That this is but a name of Office, and therefore the Judgment good, as 1 Mar. Writ of Summons of Parliament ilueth, without these words (Supream Head) and the Writ was holden good, for it is not parcell of the name, but addition only: So here, Fenner and Wray contrary, for the words are Creamas, Coronamus, nomen imponimus, Ergo, part of his name, which Clench also granted, and afterwards Dethick was discharged.

Pasc. 32. *Eliz. Rot.* 318. In the Kings Bench.

CCCXXXVIII. Strait *and* Braggs *Case.*

IN an Action of Trespasse, for breaking his Close in H, the Defendant pleaded, that long before the Trespass, the Dean and Chapter of Pauls, were seised of the Manor of C in the said County of H in Fee, in the Right of their Church, & so seised King Edw. the fourth by his Letters Patents, Dat. An. 1. of his Reign granted to them all Fines, pro licentia Concordandi, of all their Homagers, and Tenants, Resiants, and Non-resiants within their Fee, and shewed, that ever since they have used to have such Fines, and shewed, that 29 Eliz. A Fine was levyed in the common Pleas, betwixt the Plaintiff and one A of eleven Acres of Lands, whereof the place where is parcell, and the Post Fine was assessed to fifteen shillings, and afterwards Scambler the Forrain Opposer did allow to them the said fifteen shillings, because the said Land was within their Fee; And afterwards, in behalfe of the said Dean and Chapter, he demanded of the Plaintiff the said fifteen shil-

lings, who refuſed to pay it, wherefore he in the Right of the ſaid Dean, &c. And by their commandment took the Diſtreſſe as Bayly, &c. for the ſaid fifteen ſhillings, and afterwards ſold it, upon which the Plaintiff did demur in Law, It was moved, that it is not averred that the Land where of the Fine was levyed was within their Fee, but they ſay that Scambler allowed it to be within their Fee, and the ſame is not a ſufficient Amercement; which the Court granted: And it was the opinion of the Court, That the Dean and Chapter cannot diſtraine for this matter, but they ought to ſue for it in the Exchequer, as it appeareth, 9 H. 6. 27. In the Dutcheſſe of Somerſets Caſe: Gawdy, This grant doth not extend to the Poſt Fine, for Fine pro licentia Concordandi, is the Queens Silver, and not the Poſt Fine, Wray, All ſhall paſſe by it, for it is about one and the ſame matter, and they were of opinion, to give Judgment for the Plaintiff.

Trin. 32 *Eliz. Rot.* 451. In the Kings Bench.

CCCXXXIX. Sherewood *and* Nonnes *Caſe.*

Covenant. IN an Action of Covenant, the Plaintiff declared, that Charles Grice and Heſter his Wife were ſeiſed of certain Tenements called Withons, with diverſe Lands to the ſame appertaining, and of another parcell of Land called Dole containing eight Acres, to them and the heirs of the body of the ſaid Charles on the body of the ſaid Heſter his wife lawfully begotten, and ſo ſeiſed, 15 Eliz. leaſed the ſame to the Defendant by Indenture for years, by which Indenture the Leſſor covenanted that the Leſſee ſhould have ſufficient Houſe-boot, Fenring Wood, and Hoope Wood upon the Lands during the Terme, and that further the Leſſee covenanted for him his Executors and Aſſignes, with the Leſſor, &c. That it ſhould be lawfull for them to enter upon the Lands during the ſaid Terme, and to have egreſſe and regreſſe there, and to cut down and diſpoſe of all the Wood and Timber there growing, leaving ſufficient Houſe-boot, Fenring Wood and Hoop Wood to the Leſſee, upon the Lands called the Dole, for his expenſes at Withons, and further that he would not take any Wood or Timber upon the Premiſſes, without the aſſent or aſſignment of the Leſſor or his Aſſignes, otherwiſe, then according to the Indenture and the true meaning thereof: And further declared, That the ſaid Charles and his Wife ſo ſeiſed, levyed a Fine of part of the Land to R S and his heirs, to whom the Defendant attorned, and that the ſaid R S afterwards deviſed the ſame to I his Wife, the now Plaintiff for years, the Remainder over to another, and dyed, and that the Defendant had felled and carryed out of the Lands called Withons, twenty loads of Wood without the aſſent and aſſignment of the Leſſor or his Aſſignes, for which the Plaintiff as Aſſignee brought the Action: The Defendant pleaded, That after the Leaſe John Grice and others by aſſignment of Heſter had cut downe and carryed away fifty loads of Wood in the ſaid lands called the Dole, and ſo they had not left ſufficient Woods for his expenſes at Withons according to the Indenture, for which cauſe he took the ſaid twenty loads of Wood upon Withons for his expenſes, upon which the Plaintiff did demur in law. Godfrey, The Plea is not good; This Plea is no more, but that ſufficient Wood was not left upon the Dole for his expenſes, and although there be not, yet the Defendant cannot cut Wood elſewhere, for he hath reſtrained himſelfe by the Covenant: Alſo the Covenant of the Leſſor is, That the Leſſee ſhall have ſufficient Wood upon the Dole for his expenſes at Withons, but in his ſatisfaction he doth not alledge, that he had need of Wood for to ſpend at Withons, nor doth aver that he hath ſpent it there, for otherwiſe he hath not cauſe to take, &c. And the meaning was, That the Leſſe ſhould have ſufficient Wood when he had need of it. Hobart for the Defendant, He would not ſpeak to the Plea in Bar,

Bar, but he conceived, that the Declaration was not good, for here no breach of covenant is assigned, for the Covenant is in the Disjunctive, scil. That the Defendant should not take Wood without the assent and assignment of the Lessor or his Assignes; And the Plaintiff chargeth the Defendant with cutting of Wood without the assent or assignment of the Lessor, so he would compell us to prove more then we ought, for if he did it with their assent only, or by their assignment only, it is sufficient, but if the Covenant had been in the copulative, both was necessary: And for the nature of Copulatives he cited the Case, where two Church-wardens bring an Action of Trespasse, the Defendant pleads, That the Plaintiffs are not Church-wardens, upon which they are at Issue, The Jury find, That the one was Church-warden and the other not, and for that, the Plaintiffs could not have Judgement, for if the one of them be not Church-warden, then the Plaintiffs are not Church-wardens, for the copulatives ought not to be dis-joyned: And he cited the case lately ruled in the common Pleas betwixt Ognell and Underwood concerning Crucifeild Grange, A leased unto B certaine Lands for forty years, B leased part of the same to C for ten years. A grants a Rent-charge out of the Lands, in tenura & occupatione B, It was resolved, That the Lands leased to C should not be charged with that Rent, for although it was in tenura B, yet it was not in his occupation, and both are requisite, because in the copulative; So here, the Lessee may cut Wood with the assent of the Lessor without any assignment: Also here the substance of the covenant cannot charge the Defendant, for although it be in the Negative, yet it is not absolute in the Negative, but doth refer unto the covenant precedent, For the words are, That the Lessee shall not cut Woods, aliter quam, according to the intent of the Indenture, where the covenant precedent is not that the Lessee shall not cut Woods but in the Dole, but that the Lessor might cut down any Trees in the Dole leaving sufficient for the Lessee, which covenant in it selfe doth not restraine the Lessee to cut down any Trees in any part of the Lands demised, nor abridgeth the power which the Law giveth to him by reason of the demise; Then when this last covenant comes, i. e. That the Lessee will not cut, aliter, then according to the meaning of the Indenture without the assent, &c. the same doth not restraine him from the power which the meaning of the Indenture gives, and so no breach of covenant can be assigned in this. For by virtue of the Lease, the Lessee of common Right may take necessary Fuell upon any part of the Land leased: Also this first covenant being in the Affirmative doth not abridge any Interest, as 28 H. 8. 19. The Lessor covenants, That the Lessee shall have sufficient Hedge-boot by assignment of the Bayly; It is holden by Baldwin and Shelley, That the Lessee may take it without assignment, because there are noe Negative words, & non aliter. So 8 E. 3. 10. A Rent of ten pounds was granted to Husband and Wife, and if the Husband overlive his Wife that he shall have three pounds Rent, and if the Wife do overlive the Husband, shee shall have forty shillings, there it was holden that the Rent of ten pounds continued, not restrained by the severance of any of them: And although paradventure it appeareth here, that the meaning of the parties was, That the Lessee should not cut down any Wood but in the Dole, yet for as much as such meaning doth not stand with the Law, it shall be rejected, as it was holden to one in the case betwixt Benet and French, where a man seised of diverse lands, devised parcel of it called Gages, to the erecting of a Schoole, and another parcell unto B in Fee, and all his other Lands unto one French in Fee, The devise of Gages was holden void, because too generall, for no person is named; and it was further holden, that it passed by the generall devise to French, and yet that was not the meaning of the Devisor: Also the Plaintiff is not Assignee but of parcell of the Reversion, for if the Reversion is granted to him for years, and such Assignee cannot have an Action of cove-

nant, for a covenant is a thing in Action, and annexed to the Reversion, so that if the Reversion doth not continue in its first course as it was at the time of the creation of the covenant, but be altred or divided, the covenant is destroyed, and therefore it was holden, 32 H. 8. Betwixt Wiseman and Warringer, where a Lease for years was made of one hundred Acres of Lands, rendring ten pound Rent, and afterwards the Lessor granted fifty Acres of it, that the Grantee should not have any part of the Rent, but all the Rent was destroyed. So in our case here, the Grantee hath but parcell of the estate, a Terme for years, and so is not an Assignee intended, as the case betwixt Randall and Browne in the court of Wards: Randall being seised of certaine Lands, covenanted with B, that if he pay unto him, his Heirs, and Assignes five hundred pounds, that then he and his Heirs would stand seised to the use of the said B and his Heirs; Randall devised the Land to his Wife during the minority of his Son, the Remainder to his Son in Fee and dyed, having made his Wife his Executrix: Browne at the day and place tendred the mony generally, the Wife having but an estate for years in the Land, took the money, It was holden, that the same was not a sufficient tender, for the Wife is not Assignee, for shee hath an Interest but for years, and here, the Son is to beare the losse, for by a lawfull tender the Inheritance shall be devested out of him, and therefore the tender ought to be made to him and not to the Wife. Also as the case is here, he is no Assignee, for although Charles Grice and his Wife hath the Reversion, to them and the Heires of the body of Charles, and levy a Fine without Proclamations, nothing passeth but his owne estate, and then the Conusee hath not any estate, but during the life of Charles, and then when a man is seised to him and his Heirs during the life of another, he hath not such an estate as he can devise by the Statute, and then when he deviseth it to his Wife for years, it is void, &c. It was adjorned.

Trin. 33 *Eliz.* In the Kings Bench.

CCCXL. Smith *and* Hitchcocks *Case.*

Assumpsit.

IN an Action upon the case, the Plaintiff declared, that whereas the Defendant was endebted unto him, 19 Maij 30 Eliz. The Defendant in consideration that the Plaintiff would forbear to sue him untill such a day after, promised at the said day to pay the debt: The Defendant pleaded, how that 29. Maij, 29 Eliz. He was endebted unto the Plaintiff in the said sum, for assurance of which, afterwards he acknowledged a Statute to the Plaintiff, upon which he had execution, and had levyed the money, absque hoc, that he was endebted to the Plaintiff, antea, vel post, the said day, aliquo modo, upon which the Plaintiff did demur. It was argued that the Traverse was not good, for the consideration in Assumpsit is not traversable, because it is but conveyance, and amount to the generall Issue, as in debt upon the sale of a Horse, it is no Plea for the Defendant to say, that no such Horse was sold to him. Partridge, If the conveyance be the ground of the suit it is traversable, an Action upon the case against an Hostler, it is a good Plea that he is not an Hostler, 2 H. 4. 7. See 26 H. 8. Br. Traverse, 341. In an Action upon the case, the Plaintiff declared, that whereas the Defendant, habuit ex deliberatione, of the Plaintiff certain goods, the said Defendant in consideration of ten shillings, Assumpsit & eidem querenti promisit salvo Custodire, &c. Non habuit ex deliberatione, is a good Plea. Godfrey, The Defendant doth not answer the point of our Action, which is the Assumpsit, but only by way of Argument, 11 E. 4. 4. In Trespas upon the Statute of 5 R. 2. by the Master of a Colledge and his confreers, the Defendant doth justifie by reason

reaſon of a Leaſe made by a Predeceſſor of the Plaintiff, and his Confreers by their Deed under their common Seal, the Plaintiff, Replicando ſaith, That at the time of the making of the Leaſe, there was no ſuch Colledge, and it was holden no Plea, for it is no anſwer but by Argument. Gawdy Juſtice, In all caſes where the Defendant may wage his Law, there the conveyance is traverſable: Wray, The cauſe of the Action is the Aſſumpſit, therefore the conſideration is not traverſable, for it is not the point with which the Plaintiff is charged; And it is common here, that the Declaration in ſuch Action upon the caſe, in conſideration of diverſe ſums of money, without any more certainty is good, which ſhould not be good, if the conſideration were traverſable, but the conſideration is to be given in Evidence, and it is alſo common, that in an Action upon the caſe in Trover and Converſion, the Trover is not traverſable, for the Converſion is the point of the Action: Fenner Juſtice, The debt here is not the cauſe of the Action, but only the Aſſumpſit. In debt upon Arbitrament, the Arbitrament is traverſable; So in debt for Rent upon a Demiſe, the Demiſe is traverſable, for the Arbitrament, and Demiſe is the cauſe and ground of the Action: At another day it was moved againe, and Gawdy, mutata opinione ſaid, that conſideration Executory, is traverſable: as where one in conſideration, that he may marry my Daughter, or of ſervice promiſeth to pay, the ſame conſideration is traverſable, contrary of a conſideration executed: And afterwards Judgement was given for the Plaintiff. Traverſe.

Trin. 33 *Eliz.* In the Court of Wards.

CCCXLI. Eſtons *Caſe.*

ESton was ſeiſed of Lands in Fee holden of the King in cheife, and took a Wife ſeiſed of other Lands holden in Socage, they have Iſſue, and the Husband dyeth; And afterwards the Wife dyeth: Owen Serjeant conceived, That the Queen ſhould not have the Wardſhip of the Land of the Wife, or the primer ſeiſin of it: And if the Husband had ſurvived his Wife being Tenant by the Curteſie, the Queen ſhould not have Primer ſeiſin of it after his deceaſe; Wray, If the Father be ſeiſed of Lands holden in Socage, and the Mother of Lands holden in Knights ſervice, and the Husband overlives his Wife being Tenant by the Curteſie, the King ſhall have all: Anderſon denyed that, & he conceived, That the opinion of Stamford is not Law, and yet ſee 13 H 4. 278. Where the Father is ſeiſed of Lands in cheife, and the mother of other, and the Father dyeth, and afterwards the Mother dyeth, both ſhall be in ward. And it was ſaid, That if there be Grandfather, Father, and Son, and the Father dyeth ſeiſed of Lands holden in Socage; and afterwards the Grandfather dyeth ſeiſed of Lands in Knights ſervice, the Lands in Socage ſhall not be in ward: Anderſon held ſtrongly, That the Queen ſhould have Primer ſeiſin of the Lands of the Mother: Wray contrary, Quære.

Trin. 33. *Eliz.* In the Court of Wards.

CCCXLII. Ellis Hartops *Caſe.*

ELlis Hartop was ſeiſed of diverſe Lands, whereof part was holden of the King in Knights ſervice, and deviſed two parts thereof to W Denham and his Heires, to the uſe of T his Brother, and his wife, and afterwards to the uſe of the ſaid T and his Heirs males, T dyed in the life of the Deviſor, and afterwards

terwards a Son is borne; First it was agreed that a Devise might be to the use of another; Then, when Cestuy que use dyeth in the life of the Devisor, the Devisee shall take it, and when a Son is borne, it shall goe to him: But if the use be void, then the Devisee shall have it to his own use, for every devise doth imply a consideration: Coke was of opinion, That the Son takes by discent, when Cestuy que use, to whom Land is devised, doth refuse the use, the Devisee cannot take it, for he shall not have it to his own use, for if the use be void, the devise is also void; And the use is void, for Cestuy que use dyed in the life of the Devisor, which see Bret and Rygdens case. A man seised of three Acres, bargaines and sells one of them, without shewing which, and that before the Statute of 27 H. 8. The Bargainee dyeth before Election, no Election descends to the Heire, for then he should be a Purchasor: And by Wray, and Anderson, The devise is void, and it is all one with Brett and Rigdens case. And by Anderson, a man deviseth Lands to the use of one, which use by possibility is good, and by possibility not good; If afterwards Cestuy que use cannot take, the Devisee shall be to the use of the Devisor and his Heirs.

Trin. 33. *Eliz.* In the Kings Bench.

CCCLXIII. Weston *and* Garmons *Case.*

Assize. ASsize was brought of a Rent of fifty pounds per annum, and the Plaintiff made his plaint to be disseised of his Free-hold in H E, and H W: And shewed, that John Vaughan and Amy his Wife, who before was the wife of one Weston, and Mother of Sir Henry Weston, the Plaintiff in the Assize was seised of the said Mannors of H W, and H E, lying in Barton and Kinton in Fee. And 18 Eliz. A Fine was levyed betwixt Robert Vaugham, and Miles Whitney complainants, and the said John Vaughan and Amy his Wife, and Francis their Son Defendants of the said two Mannors, inter alia per nomen, of the Mannors of H E, and H W, and of fifty Messuages, three hundred Acres of Lands, two hundred Acres of Meadow, cum pertinentijs, in the said Townes, by which Fine the said Defendants, did acknowledge the right of the said Mannors and Tenements, to be the Right of the Complainants, come ceo, &c. with warranty, of the said Husband and Wife, for which the Complainants did render a Rent of fifty pounds, per annum, with clause of distresse, in dictis Manerijs, to the said John and Amy, and the Heirs of Amy, and also rendred the Tenements aforesaid, with the Appurtenances to the said John and Amy for their lives, the Remainder to the said Francis their Son in tail, the Remainder to the said Amy and her Heirs; and that John and Amy dyed, by force whereof the said Rent discendeth to the said Plaintiff, as Son and Heire of the said Amy, and that the said Francis entred into the said Mannors as in his Remainder, and was seised in tail, and was seised of the said Rent by the Hands of the said Francis, and afterwards thereof did enfeoff the said Garmons the Defendant, &c. The Tenant pleaded, That the Plaintiff was never seised so as he could be disseised, and if, &c. Nul tor. nul disseisin, which was found for the Plaintiff who had Judgement and Execution, upon which the Tenant brought a Writ of Error: Stephens assigned Error, First, the Fine is levyed of two Mannors, inter alia, so as to other Lands passed by the Fine besides the Mannors, and so the Rent is granted out of the said Lands and Mannors, and no other Lands which passed by the Fine, and then upon the Plaintiffs own shewing it appeares, that all the Tenants of the Lands charged with the Rent in demand, are not named in the Assize: Secondly, Error: This Rent is granted only out of the Estate taile, for Amy hath Fee in both as well the Rent as the Land, and then when the

the eſtate tail is determined, the Rent is alſo determined, and he hath not averred the life of the Tenant in tail, or any of his Iſſue, wherefore it ſhall be intended that he is dead without iſſue, and then the Rent is gon, and then he hath not any cauſe to have Aſſize: Bourchier, As to the firſt conceived and argued that it is not Error, for although theſe words (inter alia, &c.) yet it ſhal not be intended that the Conuſor had any other Lands or that the Rent is iſſuing out of other Lands then thoſe two Mannors which are expreſſed, & not inter alia: As to the ſecond, the continuance of the tail needs not to be averred, for the Tenant in tail hath enfeoffed the Tenant of the Land, by which the eſtate tail is diſcontinued; And although the Tenant in tail be dead without iſſue, yet the Rent doth remaine until Recovery of the Land by Formedon in the Remainder. Fenner Juſtice was of opinion, That the Per nomen ſhould go unto the Mannors onely, and ſhould not extend to the inter alia: For if a man in pleading ſaith, that I. S. was ſeiſed of twenty acres of Land, and thereof (inter alia) did enfeoff him per nomen of Green-weade, the ſame ſhall not have reference to the inter alia, but onely to the twenty acres: And the averment of the continuance of the Tail needs not, for the Eſtate-tail is diſcontinued. Gawdy Juſtice was of opinion, That the per nomen ſhould go as well to the inter alia, as to the two Mannors, and then all the Ter-tenants are not named in the Aſſiſe, and the ſame needs not to be pleaded, for it appears of the Plaintiffs own ſhewing, and there needs no averment of the continuance of the Tail for the cauſe aforeſaid. Clench Juſtice, The per nomen doth refer to all, which ſee by the Fine, which ſhewes that other Lands paſſed by the Fine, then the ſaid two Mannors. And as to the ſecond point he ſaid, There needed no averment. Gawdy, As to the firſt Error, the ſame cannot be ſaved by any way, but to ſay, That the Conuſor was not ſeiſed of any other Lands then the ſaid two Mannors, and then the Fine doth not extend unto it, and then no Rent is granted out of it. Fenner; In the Common Pleas, in the great caſe of Fines, it was holden, that in pleading of a Fine, it needs not to ſay, That the Conuſor was ſeiſed, for if the Conuſor or Conuſee were ſeiſed, it is ſufficient: for ſuch pleading is contrary in it ſelf; for a Fine, ſur Conuſans de droit come ceo, &c. doth ſuppoſe a precedent Gift: It was alſo obejected, That here is a confuſion in this Fine, for the Rent is rendred to the Husband and Wife, and to the Heires of the Wife, and the Land is rendred to the Husband and Wife for their lives, the Remainder to Francis in Tail, the Remainder to the Wife and her Heires: And theſe matters cannot ſtand together in a Fine, but the one will confound the other: But as to that, it was ſaid, that the Law ſhall Marſhall theſe two renders, ſo as they both ſhall ſtand; And it is not like unto a Rent-ſervice, for a Rent-ſervice iſſueth out of the whole Eſtate: And therefore if a Remainder upon an Eſtate for life Eſcheats, the Seigniory is gone even during the life of the Tenant for life; which ſee, 3 H. 6. 1. contrary of a Rent-charge: For if the Grantee of a Rent in Fee purchaſeth the remainder of the Land out of which it is depending out of an Eſtate for life, he ſhall have the Rent during the life of the Tenant for life. And of that opinion were all the three Juſtices, for the Conuſors took by ſeverall Acts, and the Eſtate is charged, for it cometh under the Grant. Fenner Juſtice, There is a difference betwixt a Rent ſervice and a Rent-charge, or Common, for that ſhall charge onely the Poſſeſſion, but a Rent-charge ſhall charge the whole Eſtate: And therefore if he who hath a Rent-ſervice releaſeth to him in the Remainder upon an Eſtate-tail, or for life, the Rent is extinct; which Gawdy denied: And this Caſe was put, The Diſſeiſee doth releaſe to the Leſſee for yeares of his Diſſeiſor, nihil operatur: But if the Diſſeiſor and Diſſeiſee joyn in a Releaſe to ſuch Leſſee the ſame is good, for firſt it ſhall enure as the Releaſe of the Diſſeiſor, and then of the Diſſeiſee, &c.

Mich.

Mic. 32 & 33 *Eliz.* In the Kings Bench.

CCCXLIV Tedcastell *and* Hallywells *Case*.

Debt. IN Debt upon a Bond, the Defendant pleaded, That the Condition was, That whereas John Hallywell had put himself to be an Apprentice to the Plaintiff, if the Defendant John Hallywell during his Apprentiship, or any other for him by his consent or agreement take, or riotously spend any of the Goods of his said Master the Plaintiff: If then the Defendant within one month after notice thereof given to him, do pay and satisfie the Plaintiff for all such summs of moneys, Wares, &c. so taken, or riotously spent by the Defendant, or by any other by his procurement or consent, the same being sufficiently proved; that then, &c. The Defendant by protestation, Quod nec ipse, nor any other by his procurement or consent had taken, or riotously spent the Goods of the Plaintiff: for plea saith, That the Plaintiff before the Writ brought had not sufficiently proved, that the said John Hallywell took, or riotously spent any of the Plaintiffs Goods: Upon which the Plaintiff did demur in Law. It was argued by Daniel, That the proof is sufficient and good for the time, if it be tryed in the Action upon this Obligation: and the proof intended is proof by twelve men, for it is not set down before what person it shall be proved, nor any manner of proof appointed, and therefore it shall be tryed according to the Law of the Land: which see 10 E. 11. 7 *R.*2 bar 241. Godfrey contrary, This case is not like to the cases before, for here is a further matter. First warning, and a month after notice pay, &c. And if the proof shall be made in this Action, the Defendant shall lose the benefit of the Condition, which gives time to pay it within a month after; for in all such cases the precedent Act of the Obligee is traversable, as 10 H. 7. 13 I am bound by Obligation to enfeoff such a person of such Lands as the Obligee shall appoint. In an action brought against me, I shall say, That the Plaintiff hath not appointed, &c. And here ought to be notice first, and proof ought to precede the notice by the meaning of the condition, and so this differs from the other cases put, for here proof is not the substance of the whole: Owen Serjeant, It is the folly of the Defendant to lye himselfe to such an inconvenience, for now he ought to pay the mony without delay of any moneth: And here the Defendant ought to plead, That he hath not imbezelled any goods of the Plaintiff, and the Plaintiff Replicando, shall say; And shew the speciall matter that he hath given notice to him thereof: See 15 E. 4. 25.

18. *Eliz.* In the Kings Bench

CCCXLV. Manning *and* Andrewes *Case*.

Devise. IN Ejectione firmæ, the Jury found by speciall Verdict: That *Richard* Hart, and Katherine his Wife, and diverse other persons, 1 H. 8. were seised of the Lands in question, to the use of Richard and his Heirs, ad perimplend. ultimam volunt. dict. Rich. who the first of August, 8 H. 8. by his Will in writing devised, That his Feoffees should be from thenceforth seised to the use of his said Wife for her life, and after to the use of W H his Son for his life, without impeachment of Wast, and after the death of the said Katharine his Wife, William his Son, and Joan wife of the said William, his Feoffes should be seised to the use of the next heire of the body of the said William and Joan lawfully begotten, for the terme of the life of the same Heire, and

and after the decaſe of the ſame Heire, to the uſe of the next heir, of the ſame heire lawfully begotten, and for default of ſuch iſſue, to the uſe of the heirs of the body of the ſaid William and Joan lawfully begotten, for the terme of life or lives of every ſuch heire, or heirs, and for default of ſuch heires to the uſe of the heirs of the body of the ſaid William, and for default, &c. to the right heirs of William: And further he willed, That if any of the ſaid heirs ſhall ſet, alien, lay to morgage, the right, title, and intereſt which they or any of them ſhall have in or out of the ſame Lands, or by their conſent or aſſent ſuffer any Recovery to be had againſt them, &c. Or do any other Act, whereby they or their heirs, or any of them may or ought to be diſinherited; That then the uſe limited to ſuch heire ſo doing, ſhall be void and of no effect during his life: And that his ſaid Feoffees ſhall be thenceforth ſeiſed to the uſe of the heir apparant of ſuch Offender as though he were dead: Richard Hart dyed, William had iſſue by the ſaid Joan his Wife, a Son named Thomas and dyed, and afterwards, 31 H. 8. Joan dyed, Katharine dyed, Thomas entred, and had Iſſue Francis and Percivall: Thomas by Deed indented, 1 Auguſt, 4. Eliz. Bargained and ſold to Andrewes, and levyed a Fine to him with warranty: And afterwards, 6 Eliz. Francis levyed a Fine to the ſaid Andrewes, Sur conuſans de droit come ceo: And further by the ſaid Fine releaſed to him with warranty, at the time of which Fine levyed, Percivall was heire apparant to the ſaid Francis, Francis after had iſſue I and F who are now living: The Heire of the Survivor of the Feoffees within five years after the age of Percivall and ſeven years after the Fine levyed, enter to revive the uſe limited to Percivall, who entred, and leaſed to the Plaintiff. This caſe was argued by the Juſtices of the Kings Bench, &c. Firſt, It was agreed by the whole Court, That Richard Hart being ſeiſed with ſeven others, unto the uſe of himſelfe and his Heirs, might well deviſe all the uſe, although his uſe was in part ſuſpended becauſe he was joyntly ſeiſed with ſeven others, to his own uſe, and ſo the uſe for the eighth part ſuſpended, for when this deviſe is to take effect, i. e. at the time of his death all the poſſeſſion of the Land by the Survivor paſſeth from the uſe, and then the uſe being withdrawn from the poſſeſſion ſhall well paſſe: And by Wray, A uſe ſuſpended may be deviſed: As if Feoffees to uſe before the Statute of 27 H. 8. be diſſeiſed, by which diſſeiſin the uſe is ſuſpended, and afterwards during the diſſeiſin, Ceſtuy que uſe, by his Will deviſeth, That his Feoffees ſhall re-enter and then make an eſtate to J S in Fee, the ſame is a good deviſe, for by that diſſeiſin the truſt and confidence repoſed by Ceſtuy que uſe, in the Feoffees, is not ſuſpended: Secondly, It was holden that here, a uſe implyed was limited to Joan the Wife of William, although there be not any expreſſe deviſe of it, according to the Book of 13 H. 7. 17. Thirdly, when a uſe is limited to the Heir of the body of William and Joan lawfully begotten for life, and afterwards to the heire of the body of the ſame heire for life, &c. Geofry Juſtice was of opinion, That here is in effect an eſtate tayle, for the eſtates limited are directed to goe in courſe of an eſtate tail, for he wills, That every heire of the body of his Son ſhall have the Land, and the ſpeciall words ſhall not make another eſtate to paſſe, but that which the Law wills; As if Lands be given to one for life, the Remainder after his death to the Heirs of his body lawfully begotten, notwithſtanding that the words of the limitation imply two ſeverall eſtates, yet becauſe the Law ſo wills, it is but one eſtate: Gawdy Juſtice ſaid, That every iſſue begotten betwixt William and Joan, ſhould have an eſtate for life ſucceſſive, and a Remainder in tail expectant as right heire of the body of William, and this eſtate tail ſhall not be executed in poſſeſſion by reaſon of the meſne, Remainder for life limited to the heir of the body of William and Joan, and although that theſe meſne Remainders are but upon a contingent, and not in eſſe, yet ſuch regard ſhall be had to them, that they

Uſe ſuſpended, yet the Land deviſed.

A Contingent ſhall hinder the execution of an eſtate in poſſeſſion.

they shall hinder the execution of the estates for life, and in tail in possession: As if an estate be made to A for life, the Remainder to the right heirs of B in tail, the Remainder in Fee to A, although the estate tail be in obeyance, and not in esse during the life of B, yet in respect thereof the Free-hold and Fee shall not be conjoyned. Southcote Justice, To the same purpose: And he put a case lately adjudged betwixt Vaughan and Alcock: Land was devised to two men, and if any of them dyeth, his heirs shall inherit, these devisees are Tenants in common, because in by devise, but contrary if it were by way of Grant: Lands are devised to A and B to be betwixt them devided, they are Tenants in common: Wray, William and Thomas have but for life, for they are Purchasors by the name (heir) in the singular number, but when he goes further, and sayes, for want of such issue to the heirs of the body of William, in the plurall number, now William hath an Inheritance: And if a devise be made to one for life, and then to his heire for life, and so from heir to heir in perpetuum for life, here are two estates for life, and the other Devisees have Fee, for estates for life cannot be limited by generall words from heir to heire, but by speciall words they may: And here, Thomas being next heir of the body of William and Joan, hath an estate for life, and also being heir of the body of the said William, hath a Remainder in tail to him limited, & the mesne remaineth limited to others, i. e to the next heir of the body of Thomas being in obeyance because limited by the name heir, his Father being alive, shall not hinder the execution of these estates, but they shall remaine in force according to the rules of the common Law: Then Thomas so being seised levyeth a Fine against the Provision of the Will, by which Thomas hath forfeited his estate for life, and so his next heir shall have the Land during his life: And a great reason, wherefore the heirs, ut supra, after the two first limitations shall have tail, is, because that if every heire should have but for life, they should never have any Interest in the Lands by these limitations, for by the expresse words of the devise, none shall take but the heire of the first heire for ever, i. e. When Thomas Aliens, by which the use vests in Francis, and when afterwards Francis levyeth a Fine, then the use vests in Percivall Hart, being next heir of the said Francis at the time of the Fine levyed (notwithstanding that afterwards Francis hath a Son which is his next heir) and therefore the use in Percivall by the birth of the said Son in Francis shall not be devested, because it was a thing vested in him before by purchase, 9 H. 7 25. A enfeoffs B upon condition on the part of A to be performed, and dyeth, having issue a Daughter, the Daughter performes the condition, and afterwards a Son is borne, the Daughter shall hold the Lands against the Son: So 5 E. 4 6. A woman hath issue a Daughter, and afterwards consents to a Ravisher, the Daughter enters, and afterwards a Son is borne, yet the Daughter shall hold the Lands for ever. i. e. And Geofries Justice said Francis being in by force of the Forfeiture, shall not be subject to the limitation of the Will, i. e. to any forfeiture if he alien, for the estate which Francis hath for his life is but an estate gained by the offence of his Father, and the use was limited to him upon the Will of Richard, and then the said estate is not subject to the Proviso of the Will, and then hath not Francis committed any forfeiture: And admit Francis shall forfeit, yet Percivall shall get nothing thereby, but the estate which Francis had at the time of the Fine levyed, scil. the Free-hold only, for no estate of Inheritance was in him living his Father, i. e. As to the regresse of the Feoffees, Geofries was of opinion, That where an use is limited to a person certain, and thereupon vested in the person to whom it is limited, That the Entry of the Feoffees in such case is not requisite, notwithstanding that the first estates be discontinued, but where the use (as in our case) is not limited to a person certain in esse, but is in obeyance, not vested in any person upon the limitation of it, some estate ought to be left in the

Vaughan and Alcocks case.

Estate vested, shall not be devested.

the Feoffees to maintain that uſe, and to render it according to the limitation, and in our caſe, theſe uſes not in eſſe at the time of the making of the Statute of 27.H.8. could not be executed by the ſaid Statute, but now at the appointed time by the limitation ſhall be raiſed and revived by the Entry of the Feoffees, but here by the Fine and Non-claim, the Feoffees are bound, and their Entry taken away, and ſo no uſe can accrue to Percival Hart by ſuch Entry. Southcote Juſtice was of opinion, that the Feoffees cannot enter at all, becauſe that by the Statute of 27. H.8. nothing is left in them at the time of the making of the Statute, which ſaves the rights of every perſon, &c. other than the Feoffees, ſo as no right is ſaved to them but all is drawn out of them by the operation of the Statute, and the ſecond ſaving of the Statute, ſaves to the Feoffees all their former Right, ſo as the Right which the Feoffees had by the Feoffment to the uſe is utterly gone. But Percival Hart may well enter, for he is not bound to the five years after the Fine levied, for he had not right at the time of the Fine levied, but his right came by the Fine, Wray chief Juſtice. The Feoffees are not to enter for the Statute of 27 H.8. hath two branches, 1. gives the poſſeſſion to Ceſtuy que uſe in ſuch manner as he hath in the uſe. 2. takes away all the right out of the Feoffees, and gives it to Ceſty que uſe, ſo as nothing at all remains in the Feoffees; for if an Act of Parliament will give to me all the Lands, whereof my brother Southcote is ſeiſed, and that I ſhall be in the Seiſin thereof, now is the actuall poſſeſſion in me without my Entry: ſo alwayes, where an uſe is often executed by the Statue, Ceſtuy que uſe, without any Entry hath an actual poſſeſſion. i. As to the uſes contingent, nothing remains in the Feoffees for the ſerving of them when they happen, but the whole eſtate is ſettled in the Ceſtuy que uſe, yet ſubject to ſuch uſe, and he ſhall render the ſame upon the contingency: And if any eſtate ſhould remain in the Feoffees, it could be but an eſtate for life, for the Fee ſimple is executed in Ceſtuy que uſe, with an eſtate in poſſeſſion, and then the Feoffees ſhould be ſeiſed to another uſe than was given by them the Livery. Alſo if a Feoffment be made unto the uſe of the Feoffor, and his heirs, untill J.S. hath paid unto the Feoffor 100 l. and from thenceforth the Feoffor and his heirs ſhall be ſeiſed to the uſe of the ſaid J.S. and his heirs, if upon ſuch Feoffment any thing ſhould remain in the Feoffees before the payment by I S, the ſame ſhould be a Fee-ſimple, and then there ſhould be two Fee ſimples of one and the ſame Lands, one in the Feoffor, and the other in the Feoffees which ſhould be abſurde, and therefore the beſt way to avoid ſuch inconveniencies is to conſtrue the Statute, that it drawes the whole eſtate of the Lands, and alſo the confidence out of the Feoffees, and repoſeth it upon the Lands, the which by the operation of the Statute, ſhall render the uſe to every perſon in his time according to the limitation of the parties: And alſo if any Intereſt doth remaine in the Feoffees, Then if they convey to any perſon upon conſideration who hath not notice of the uſe, then the ſaid uſe ſhall never riſe, which is utterly againſt the meaning of the ſaid Statute, and the meaning of the parties, and therefore, to conſtrue the Statute, to leave nothing in the Feoffees will prevent all ſuch miſcheif: And if a Feoffment in fee be made to the uſe of the Feoffor for life, and afterwards to the uſe of his wife which ſhall be for life, and afterwards to the uſe of the right Heirs of the Feoffor; The Feoffor enfeoffeth a ſtranger, taketh a wife, now cannot the Feoffees enter during the life of the Feoffor, and after his death they cannot enter, becauſe they could not enter when the uſe to the wife was to begin, upon the intermarriage, & then if the Entry of the Feoffees in ſuch caſe ſhould be requiſite the uſe limited to the wife by the Act of the Feoffor ſhould be deſtroyed againſt his own limitation, which is ſtrong againſt the meaning of the Act aforeſaid, for by the ſaid act, the Land is credited with the ſaid uſe,

which shall never faile in the performance of it. And such contingent estates in Remainder may be limited in possession, a Fortiori in use, which see 4 E. 6. Colthirsts case, 23. And Plesingtons case, 6 R. 2. And it is true, at the common Law, the Entry of the Feoffees was requisite, because the wrong was done unto them by reason of the possession which they then had, but now by the Statute, all is drawn out of them, and then there is no reason that they medle with the Lands wherein they have now nothing to doe, and the scope of the Statute is, utterly to disable the Feoffees to do any thing in prejudice of the uses limited, so as the Feoffees are not to any purpose but as a Pipe to convey the Lands to others; So as they cannot by their Release or confirmation, &c. bind the uses which are to grow and arise by the limitation knit unto the Feoffment made unto them, which see Br. 30 H. 8. Feoffments to uses, 50. A covenants with B, That when A shall be enfeoffed by B of three Acres of Lands in D, that then the said A and his Heirs shall be seised of Land of the said A, in S, to the use of B and his Heirs, and afterwards A enfeoffeth a stanger of his Lands in S; And afterwards B enfeoffeth A of his Lands in D, now the Feoffee of A shall be seised to the use of B, notwithstanding that the said Feoffee had not notice of the use, for the Land is bound with the use in whose hands soever it come: And see the like case, ibid. 1. Ma. 59. Upon the reason of which cases many assurances have been made, for it is the common manner of Mortgage, i. e. If the Mortgagor pay such a sum, &c. that then the Mortgagee and his Heires shall be seised after such payment, to the use of the Mortgagor and his Heirs; In that case although that the Mortgagee alien, yet upon the payment, the use shall rise well enough out of the possession of the Alienee, and the Lands shall be in the Mortgagor without any Entry: For the Mortgagee could not enter against his own alienation, to revive the use which is to rise upon the payment, and therefore without any assistance of such Entry, it shall arise: As at the common Law, Land is given to A in tail, the Remainder to the right heirs of B, A levyes a Fine, makes a Feoffment, suffers a Recovery, &c. although the same shall bind the Issues, yet if B dyeth, and afterwards A dyeth without issue, now notwithstanding this Fine, &c. The right Heir of B may enter: And alwayes a use shall spring out of the Land at his due opportunity, & it is a collaterall charge which bindes the Lands by the first Livery, and cannot be discharged, vi. 49. Ass. 8. & 49 E. 3. 16. Isabell Goodcheapes case: A man deviseth, that his Executors shall sell his Lands, and afterwards dyeth without heire, so as the Land escheats to the King, yet the authority given to the Executors shall bind the Lands in whose hands soever it comes, &c. And so a title of Entry doth continue notwithstanding twenty alienations: But an use is a lesser thing then a Title of Entry, especially an use in contingent, and an use as long as it is in contingency cannot be forfeited: As if the Mortgagor be attainted and pardoned mean betwixt the Mortgage and the day of Redemption, &c. Then when Thomas levyes a Fine, Francis may well enter; And Thomas before the Fine had an estate tail executed to his Freehold, and therefore by the Fine he gave an estate of Inheritance to the Conusee, and then no right of entail remained in Francis, but he took an estate for life only, and that as a Purchasor by the limitation of the Will, and then when Francis levyed a Fine, his estate was gon (which was but for life) and then the right of the entail, and all the other estates which are especially limited are also gon, and so Percivall Hart, to whom no estate was specially limited hath not any cause to enter, &c. And it was further said by Wray: Husband and Wife Tenants in speciall tail, the Husband levyes a Fine with Proclamations and dyeth, the Wife enters, the issue in tail is barred, but if the Wife enter after the death of her Husband, and before the Proclamations passe, the issue is not bound by the Fine: And if Tenant in tail granteth, totum ta-

cum

tum suum, and after levyeth a Fine thereof with Proclamations, come ceo, &c. The Issue is barred, contrary where the Fine is upon a Release, &c.

18. *Eliz.* In the Kings Bench.

CCCXLVI. Henningham *and* Windhams *Case.*

ARthur Henningham brought a Writ of Error against Francis Windham upon a common Recovery had against Henry his Brother, and the Case was, That Land was given in speciall tail to Thomas Henningham, Father of the said Henry and the said Arthur, the Remainder in generall tail (the estate tail in possession was to him and the Heirs Males of his body) Thomas had issue the said Henry and three Daughters by one woman, and the said Arthur and two other sons by another woman, and dyed seised, Henry entred, and made a Feoffment, a common Recovery is had against the Feoffee, in which Henry is vouched, who vouched over the common Vouchee according to the usuall course of common Recoveries, Henry dyed without issue, And Arthur brought a Writ of Error being but of the halfe blood to Henry: And it was resolved by the whole Court, That Error and Attaint allwayes descends to such person to whom the Land should descend: If such Recovery, or false oath had not been; As if Lands be given to one and the Heirs Females of his body, &c. and suffers an erronious Recovery and dyeth, the heir female shall have the Writ of Error: So upon Recovery of Lands in Borough English, for such Action descends according to the Land, quod fuit concessum per totam Curiam: But it was objected on the Defendants part: That because that the Feoffee being Tenant to the Præcipe is to recover in value a Feesimple, & so Henry is to yeild a Fee-simple which should descend to his heir at the common Law if this Recovery had not been, therefore he to whom the same should descend, should have the Writ of Error, for he hath the losse: But the said Exception was not allowed: And it was said, That Tenant in tail upon such a Recovery, shall recover but an estate in tail, scil. such estate which he had at the time of the warranty made, &c. And afterwards Judgment was given that the Action was maintainable: So if a man hath Lands of the part of his mother, and loseth it by erronious Judgment and dyeth; That the heir of the part of the Mother shall have the Writ of Error.

Error.

Error and Attaint, by him to whom the Land is to descend.

18. *Eliz.* in the Kings Bench.

CCCXLVII. Foster *and* Pitfalls *Case.*

IN Ejectione firmæ the Case was: Brook devised Lands to his Wife in generall Tail, the Remainder over to a stranger in Fee, and dyed, shee took another Husband, and had issue a Daughter: The Husband and Wife levyed a Fine to a stranger: The Daughter as next Heire by 11 H. 7. entred: It was agreed by the whole Court, That an estate devised to the wife, is within the words, but not within the meaning of the Statute: Secondly, It was resolved, That no estate is within the meaning of the Statute, unlesse it be for the Joynture of the Wife: Thirdly Resolved, That the meaning of the Statute was, That the wife so preferred by the Husband should not prejudice the issues or heires of her Husband, and here nothing is left in the Issues or heirs of the Husband, so as the Wife could not prejudice them, for the Remainder is limited over.

18. *Eliz.* In the Kings Bench.

CCCXLVIII. Greenes *Caſe.*

Acceptance of Rent.

GReene made a Leaſe for years rendring Rent with clauſe of Re-entry, and the rent due at the Feaſt of the Annunciation was behind being demanded at the day, which Rent the Lesſor afterwards accepted, & afterwards entred for the condition broken, and his Entry holden lawfull, for the Rent was due before the condition broken, but if the Lesſor accepts the next Quarters Rent, then he hath loſt the benefit of Re-entry, for thereby he admits the Leſſee to be his Tenant: And if the Lesſor diſtraine for Rent due at the ſaid Feaſt of the Annunciation after the forfeiture he cannot afterwards re-enter for the ſaid forfeiture, for by his Diſtreſſe he hath affirmed the poſſeſſion of the Leſſee: So if he make an acquittance for the Rent as a Rent, contrary, if the acquittance be but for a ſum of money, and not expreſſely for the Rent, all which, tota curia conceſſit.

Entry.

CCCXLIX. 20. *Eliz.* In the common Pleas.

Entry for forfeiture.

THe Caſe was, Leſſee for life, the Remainder for life, the Remainder in tail, the Remainder in Fee; The two Tenants for life make a Feoffment in Fee. Dyer, A woman Tenant for life in Joynture, the Remainder for life, the Remainder in fee, the Tenants for life joyne in a Feoffment, the Entry of him in the Remainder in fee is lawfull by 11 H. 7. And if Tenant for life be impleaded, and he in the Remainder for life will not pray to be reſerved, he in the laſt Remainder may, and ſo in our caſe, in as much as he in the Remainder for life was party to the wrong, he in the Remainder in tail ſhall enter: Which Harper and Manuſon granted, i. e. Manwood, Although that this Feoffment be not a Diſſeiſin to him in the Remainder in tail, yet it is a wrong in a high degree, as by Littleton, A Diſſeiſor leaſeth for life to A who aliens in fee, the Diſſeiſee releaſeth to the Alienee, it is a good Releaſe, and the Diſſeiſor ſhall not enter although the Alienation was to his diſinheritance, Litt. 111. which Dyer granted: And if Tenant for life alieneth in fee, and the Alienee enfeoffeth his Father and dyeth, the ſame diſcent ſhall not avayle him no more then in caſe of Diſſeiſin: It hath been objected, that that is the Livery of the firſt Tenant for life, and the confirmation of him in the Remainder for life, Dyer was of opinion, That by this Livery the Remainder for life paſſeth, & this Livery ſhall be as well the Livery of him in the Remainder as of the Tenant in poſſeſſion, & although where an eſtate is made lawfully by many, it ſhall be ſaid the Livery of him only who lawfully may make Livery; Yet where an eſtate is wrongfully made it ſhal be accounted in Law, the Livery of al who joyn in it. And in this, the Remainder for life is extinguiſhed by the Livery, in the Feoffee, and the Livery of him in the Remainder for life ſhal be holden a void Livery, eſpecially when he joyns with ſuch a perſon who hath not authority to make Livery; As if the Lord and a ſtranger Diſſeiſe the Tenant and make a Feoffment over, the whole Seigniory is extinct, as if he ſoly had been ſeiſed, ſo if he in the Reverſion, and a ſtranger diſſeiſe for life, and make a Feoffment over, the Seigniory is gon, and yet it is the Livery of the Leſſee only: And although it be but the confirmation of him in the Remainder for life, yet thereby the Remainder is gon and extinct: And afterwards Judgment was given, that he Entry of him in the Remainder in tail was lawfull: And it was ſaid by the Lord Dyer, That if Tenant for life be the Remainder for life, the Remainder in fee,

Livery of ſeiſin.

Tenant

Tenant for life, in poſſeſſion alieneth in fee, that he in the Remainder in fee cannot enter, for it was not to his diſinheriſin.

CCCL. 20. *Eliz.* In the Kings Bench.

THe Caſe was; That a Capias ad Satisfaciend. was delivered to the Sheriff, and after the Sheriff did arreſt the party againſt whom the Capias iſſued, by force of a Capias Ut lagatum, and then the partie in the Capias came to the Sheriff, and prayed that the party remaine in Execution for his debt alſo, and notwithſtanding that the Sheriff let the Priſoner goe at large, and upon both Writs returned, Non eſt inventus: It was the opinion of all the Juſtices, That the Sheriff was not bound in point of Eſcape to detain the Priſoner for the Debt of the Plaintiff, and it is not like, where one is in the Fleet in Execution, there, if other condemnations in other Courts be notified to the Warden of the Fleet, he ſhall be chargeable with them all: It was holden alſon, per curiam, That if the body had been returned by Capias Ut lagatum, that the Court at the prayer of the party would grant that the Priſoner might remaine in Execution for the debt as in caſe of a Capias pro fine.

19. *Eliz.* In the common Pleas.

CCCLI. *The Lord Saint* John, *and the Counteſſe of* Kents *Caſe.*

Grants of Executors of *omnia bona ſua.*

IN Evidence given to the Jury in an Action of Debt brought by the Plaintiff againſt the Defendant: It was ſaid by Dyer, and Manwood Juſtices, That if Executors grant, omnia bona ſua, that the goods which they have as Executors doe not paſſe, which ſee 10 E. 4. 1. b. by Danby: But the contrary to that was holden by Wray cheife Juſtice of the Kings Bench, and by Plowden, in Broadbridges caſe, P. 18 Eliz. and they denyed the opinion of 10 E. 4. to be Law, for by ſuch grant made by Executors, the goods of the Teſtator doe paſſe.

CCCLII. 19. *Eliz.* In the common Pleas.

Abatement of Writ.

Account.

NOte, It was ſaid by Dyer, and Manwood Juſtices, That if one be condemned in an action upon the caſe, or Treſpaſſe upon Nihil dicit, or demurrer, &c. And a Writ iſſueth forth to enquire of the Damages, and before the returne of it, the Defendant dyeth, that the Writ ſhall not abate, for the awarding of the ſaid Writ is a Judgement: And it was ſaid by Manwood, In a Writ of Account, the Defendant is awarded to account, if the Defendant account, and be found in arrearages and dyeth, the Writ ſhall not abate, but Judgement ſhall be given that the Plaintiff ſhall recover, and the Executor ſhall be charged with the arrearages, and yet account doth not lye againſt them.

CCCLIII. 19. *Eliz.*

CCCLIII. 19. *Eliz.* In the Kings Bench.

A Did recover in Debt against B. whereupon a Fieri facias issued to the Sheriffe of Devon. and the Defendant, seeing the Writ of Execution in the Sheriffes hands, said to him, that he would pay the Debt recovered at Exeter such a day, to satisfie the Execution, at which day the Defendant paid the monie accordingly, and presently came an officer of the City of Exeter, and attached the monie in the Sheriffes hands, supposing the said A. to be indebted so much to one C. in whose name he made the Attachment, and now on the behalf of the said A. a Certiorare was prayed to remove the Attachment hither, and it was therefore holden by the whole Court that the Attachment was void, and a Certiorare granted, and Wray said, If it can be proved by oath, that if the Defendant did procure, or was assenting to the said Attachment, that Proces of contempt should issue against him, and the Sheriffe demanded of the Court what return he should make, because the monies were attached in his hands, and taken from him by force, to which Wray answered, That the Sheriffe ought to answer the monies to the Plaintiffe, which were once in his hands by force of the Execution, and that it was his folly to suffer the monie to be taken from him by colour of the said Attachment, and if the monie was taken by force, the Sheriffe had his remedie by an Action of Trespasse; for the Attachmeent was void, but the Sheriffe at the Return of the Writ, ought to answer for the Monie.

Attachment of Goods, after the monie is in the Sheriffe hands, is void.

CCCLIV. 19 *Eliz.* In the Common Pleas.

TEnant for life bargained and sold his Lands to A. and his Heirs, and afterwards levied a Fine to the Bargainee, Sur conusans de droit come ceo, &c. It was holden by the Court, that it was a forfeiture committed by the Bargainee, not by the Bargainor, who at the time of the Fine had nothing to forfeit, and it was said by Manhood Justice, That if Tenant for life be disseised, and takes a Fine, ut supra, of a stranger, it is a forfeiture and yet he in the Reversion hath but a right in Reversion; so that if Tenant for life be disseised, and the Disseisor commits Waste, he in the Reversion shall have an Action of Waste against Tenant for life, and if two Tenants for life be disseised by two, A. and B. and one of the Tenants for life doth release unto A. and the other Tenant for life doth reenter, he hath the Moyety in common with the other to whom the Release was made, and he hath revested the intire Reversion in him, in whom the Reversion was before, &c.

Forfeiture.

CCCLV. 20 *Eliz. in the Common Pleas.*

Bracebridges *Case.*

THe Case was, Thomas Bracebridge seised of a Mannour in Fee, leased a Messuage, parcell of it to one Curtes for 21 years, and afterwards 35 H.8. leased the same to one Moore for 26 years to begin after the expiration of the former Lease, and afterwards 5 E.6. he enfeoffed Griffith and others, to the use of the Feoffees themselves, and their Heirs, upon condition, That if the Feoffees did not pay to the said Thomas Bracebridge 2000 l. within 15 dayes after, that then immediately after the said 15 dayes, the Feoffees should

should stand seised of the said Mannour to the use of the said Thomas Bracebridge, and Joyce his wife for their lives, without impeachment of Wast, and afterwards to the use of T.B. their second son in Tail, with divers Remainders over, the Feoffees do not pay the said mony within the said 15 dayes, afterwards Curties attorns to the Feoffees: it was moved, if the Reversion of the Lands, passed to Curties, passeth by the Feoffment of the Mannour without attornment, which see Littleton 133,134. 2. If by the attornment of Curties, after the 15 dayes, the uses can rise to Bracebridge and his wife, &c. and it was said, That the Case 20 H.6. Avowry 11.12. If a Mannour be granted for life, the remainder over in Fee, Tenant for life dieth, if the Tenants attorn to him in the remainder, the same is good, and if a Reversion be granted to two, and one of them dieth, attornment to the survivor is good; and if a Reversion be granted to Husband and Wife, in speciall Tail, the Wife afterwards dieth without issue, Attornment to the Husband is good, and if a Reversion be given in frank marriage, and afterwards the Husband and Wife are divorced, and afterwards the particular Tenant attorns to the Wife, the same is good, and by Manwood, If a man seised of a Mannour, the demesnes of which extends into two Counties, and hath issue a Son and a Daughter by one Woman, and a Son by another woman, and dieth, the eldest Son enters into the Demesnes in one County onely, and takes the profit in one County onely, and dieth without issue, the Daughter shall have, and inherit the Demesnes or Services, whereof her brother was seised, and the Son of the half blood the rest: and by Manwood, the attornment of Curties, who was the first Lessee, shall bind Moore the second Lessee, for he ought to attorn, against whom lieth the Quid Juris clamat: and if a Lease for years be made of a Mannor, and the Reversion of it be granted to another in fee, if the Lessee for years attorneth it shall bind the Tenants of the Mannor, 18 E.2. A man seised of a Mannor, in the right of his wife, leased parcell of it for years without his wife, the Reversion thereof is not parcell of the Mannor, contrary, if the Lease had been made by the Husband and Wife: And by Dyer, if Tenant in Tail of a Mannor leaseth parcell for years, and afterwards makes a feoffment of the whole Mannor, and makes Livery in the Demesnes not leased, the Reversion of the Land leased doth not passe; for by the feoffment a wrong is done to the Lessor, which the Law shall not further enlarge than appeareth by the deed, contrary in case of Tenant in fee of a Mannor, and that without Deed with Attornment: and it was the Case of one Kellet, 25 H.8. Kellet was Cestuy que use before the Statute of 27 H.8 of divers Lands by several Conveyances, the use of some being raised upon Recovery, of some upon fine, and of some upon feoffment, and he made a feoffment of all these Lands by Deed, with a Letter of Attorney to make Livery, the Attorney entred into part of the Land, and made Livery in the name of the whole, & it was agreed by all the Justices, That the Lands passed, notwithstanding in others possession, i. other Feoffees, and by Dyer, if the Tenants of a Mannor pay their rents to the Disseisor, they may refuse again to pay them, and if a Lease be made for years, the remainder for life, if the Lessor will grant over his Reversion, the Lessee for years shall Attorn, and his attornment shall bind him in the remainder for life, and if a Lease be made to one for years, the remainder over for life, the remainder to the Lessee for years, in Fee. Now if the Lessee for years grant all his interest, &c. there needs no attornment: and if Grantee of a rent in fee leaseth it for life, and afterwards grants the Reversion to another, the Attornment of the Ter-tenant is not requisite, but onely of the Grantee for life. It was also holden, That this Attornment by Curties two years after the Livery was sufficient, for it shall have relation to the Livery to make it parcell of the Mannor, but not to punish the Lessee for waste done mean between the Livery and the Attornment

Attornment.

Kellets Case.

Relation.

tornment, but betwixt the Feoffor and Feoffee it shall passe ab initio. It was holden, also That although the uses for it limited are determined by the default of payment within the 15 dayes, yet the Feoffees shall take the Reversion by this Attornment to the second uses, and if I enfeoff one upon condition to enfeoffe J.S. who refuseth, now the Feoffee shall be seised to my use, but if the condition were to give in Tail, contrary: So here is a Limitation beyond the first use, which shall not be defeated for want of attornment to the first uses, and here it was not the meaning of Bracebridge to have the Lands again upon breach of the condition in his former estate, but according to the second use, and Judgement was given in the principal case according to the resolutions of the Judges, as aforesaid, and it was said by Harper Justice, That if a Feoffment in Fee be made to J.S. upon condition that he shall grant to A. a rent-charge, who refuseth it, J.S. shall be seised to his own use.

CCCLVI. 20 *Eliz.* In the Common Pleas.

THe Case was this, Lord and Tenant by service to pay every year such a quantity of salt, but since 10 H. 7. The Tenant hath alwayes payed the monie for salt, the question was, If the Lord might resort to the first service, and if the monie be Seisin of the salt, and Manwood took this difference, i.e. where the Lord takes a certain sum of monie for the salt, the same is not any Seisin, for the service is altered, as at the first Socage Tenure was a work to be done by labour, i.e. plowing, but now it is changed into a certain Rent, and the Lord cannot resort to have his plowing, and in Kent divers Tenants in ancient time have paid Barly for their Rent, but the same afterwards was paid in a certain sum of monie, so as now the Lord of Canterbury, who is Lord of such Tenements cannot now demand his Barly: &c. but if the sum which hath been used to be paid be incertain one year so much, and another year so much according to the price of salt, then such a payment of monie is a sufficient Seisin of the salt, Quod fuit concessum per Curiam,

Seisin.

CCCLVII 20 *Eliz.* In the Common Pleas.

IN Accompt, brought by an Heir Copy-holder, for the profits of his Copy-hold Lands taken during his Nonage, the Defendant pleaded, That by the Custome of the said Mannor, the Lord of the Mannor might assign one to take the profits of a Copyhold descended to an Infant, during his Nonage to the use of the Assignee, without rendring an accompt, and the same was holden to be a good Custome, as a Rent granted to one and his Heirs to cease during the Nonage of every Heir, but admitting, that the Custome were void, yet this Action doth not lie, for the Defendant hath not entred and taken the profits, as Prochin amy, in which Case although he was not Prochin amy, &c. he is chargeable, as Prochin amy according to his Claim, but here he claimeth by the custome and grant of the Lord, and not in the right of the Heir, and therefore it was adiudged in this time of this Quære, that if one entreth into Lands claiming by Devise, where in truth the Land devised is entailed, he should not be charged in accompt, &c.

Accompt by the heir of a Copyholder.

Custome.

CCCLVIII. 20. *Eliz.* In the common Pleas.

NOte, It was holden by the whole Court, That the Statute of 32. & 34 H. 8. of Wills, did not extend to Lands in London, but that the deviſe of the whole is good: And if Houſes in London parcell of the poſſeſſions of Abbyes came to the Crowne by Diſſolution, and he grants them over to hold in cheiſe by Knights ſervice, theſe Lands are deviſable: But it was holden, That the ſaid Statutes as Acts executed, extended to Lands in London, and ſhall be good but for two parts: And if a man hath Lands in tail, and in Fee-ſimple, which are of double the value of the Lands in tail, and deviſeth all his Lands, all the Land in Fee-ſimple ſhall paſſe. Dyer. One ſeiſed of three Mannors, the one in Capite in Fee, and two in Socage in tail, and deviſeth all his Land in Capite, it is good againſt the King for all Capite Land, and he ſhall be tyed to have the Lands in Socage, but it ſhall not bind the Heir: And a deviſe of the third part (where all is deviſed) is void as well againſt the Heir as againſt the King. And he ſaid, That if a man be ſeiſed of twenty Acres in Socage, and ten Acres in Capite, and deviſeth two parts of his Lands, it is reaſonable to ſay, That all the Socage Lands ſhall paſſe,, but if the deviſe was of two parts of all his Lands, is otherwiſe, for this word (All) implyes that the two parts ſhall be, per my & per tout, as well Capite as Socage, i. e. It was argued by Fenner, That the Lands in London are now deviſeable as they were before the Statute, for if the Deviſee of Lands in London be diſturbed, he ſhall have, Ex gravi Querela, otherwiſe it is of Lands at the common Law, and if an Aſſize of Mort-danceſter be brought of Lands in London, it is a good Plea to ſay, That the Lands are deviſable: but in an Aſſize of Mort-danceſtor of Lands at the common Law, it is not any Plea: And if a man gives Lands at the common Law, i. e. not deviſable by the common Law, he cannot deviſe the Reverſion, for the Statute ſhall not doe wrong to the perſon, i. e. to the Donee who there ſhall loſe his acquittall: but of Lands deviſable by cuſtome, it is otherwiſe; and if Land in a Burrough was deviſable for life by the Cuſtome, and afterwards came the Statute of 23 H. 8. which made all Lands deviſable, now that Land is deviſable for life by the Cuſtome, and the Reverſion by the Statute.

Expoſition of Statute, of 32. and 34. Of Wills.

Cuſtome of London.

CCCLIX. 20. *Eliz.* In the common Pleas.

IN an Action of Waſt, of Waſt aſſigned in a Wood, the Jury viewed the Wood only without entring into it: And it was holden that the ſame was ſufficient, for otherwiſe it ſhould be tedious for the Jury to have had the view of every ſtub of a Tree which had been felled: Yet Meade Juſtice ſaid, That if Waſt be aſſigned in ſeverall corners of the Wood, then the Jury is to have the view of every corner, but contrary where Waſt is aſſigned in the whole Wood: And if Waſt be aſſigned in every Room of a Houſe, the view of the Houſe generally is ſufficient. And Dyer Juſtice ſaid, That if Waſt be aſſigned in ſeverall places, and of ſome of them the Jury had not the view, of that they may find, no Waſt done.

Waſt.

View.

29 *Eliz.* In the commom Pleas.

CCCLX. *Sir* Thomas Lees *Case.*

IT was holden, per curiam: That whereas Sir Thomas Lee was seised of a Mannor, and alien the Mannor except one close parcell of the said Mannor called Newdick, and there were two Closes parcell of the said Mannor called Newdick, the one containing nine Acres, and the other containing three Acres; That the Alinee should not chose which of the said closes he would have: but the Alienor or Feoffor should have the Election which of the said Closes should passe.

Election.

CCCLXI. 20. *Eliz.* In the common Pleas.

TEnant in tail, the Remainder in tail, &c. Tenant in tail, in possession, makes a Lease for three lives, according to the Statute of 32 H. 8. and afterwards dyeth without issue, he in the Remainder before any Entry leyeth a Fine, the same is good, for by the death of Tenant in tail without issue, the Free-hold is vested in him in the Remainder in tail: And of that opinion was the whole Court.

Fines levyed by Tenant in tail in Remainder.

20. *Eliz.* in the common Pleas.

CCCLXII. Ferrand *and* Ramseys *Case.*

IN an Ejectione firmæ brought of a House in London, the Defendant pleaded; That long time before the Lesor of the Plaintiff had any thing, &c. One Ann Ramsey was seised in Fee, and dyed seised, and that the same descended to William Ramsey as Son and Heire to the said Ann, who was disseised by Isarel Owen, who leased to the Plaintiff, upon whom the said William Ramsey did re-enter: The Plaintiff Replicando, That the said Ann did not die seised, said, That before the Ejectment, one Robert Owen was seised and dyed seised, and from him descended the said House to Isarel Owen as Son and Heir of the said Robert, absque hoc, that the said Isarell did disseise the said Ann, upon which they were at issue, and at Nisi prius, in London it was given in Evidence of the Defendants part: That Crofton and Langhton were seised in Fee of the said Messuage, and by Deed indented conveyed it to one John Ramsey, Robert Dakins, and four others and their Heirs, upon condition that they the said Feoffees their Heirs or Assignes should pay to the said Ann and her Heirs six pounds thirteen shillings and four pence: And also should enfeoff the said Ann, if to the same they were required by the said Ann in her life, or within four dayes next following such Request in Fee unto the use of the said Ann and her Heirs, cum & quando ad hoc per eandem Annam requisit. fuerint, and if the said Ann dyed before such Request, that then the said Feoffees or their Heirs should enfeoff such issues of the said Ann, or such other persons which the said Ann should name, cum & quando ad hoc per eandem Annam, requisit. fuerint, or within foure dayes after such Request the said Feoffees or their Heirs should be seised of the said House, to the use of the said Ann and her Heirs. Afterwards the seventh of Aprill, 16 Eliz. Ann demanded of William Ramsey, Son and Heire of John Ramsey, six pounds thirteen shillings and four pence, being due to the said Ann, ut supra, the which summ the said William Ramsey did refuse to pay, by force of which, and by the

the Statute of 27 H. 8. The said Ann Ramsey was thereof seised, and dyed seised, and from her descended the said House to William Ramsey: The Platntiff confessed the Feoffment to Crotton and Langhton, to John Ramley and others, and shewed further, That the said Ann required surviving Feoffees to enfeoff one Robert Owen of the said House, who three dayes after made the Feoffment accordingly, Robert Owen enfeoffed John Owen, who dyed thereof seised, and from him the said House descended to Isarel Owen, Crafton dyed, Langhton having issue two Daughters, dyed; All the Feoffees but one dyed, Ann the time aforesaid demanded the said six pounds thirteen shillings and four pence of the said William Ramsey in another House in London, due at the Feast of Saint Michaell last before, who denyed to pay it, the second Daughter of Langhton entred, and thereof enfeoffed the said Isarell Owen, who leased the same to the Plaintiff, and upon that Evidence the Defendant did demur in Law: And first it was resolved by the whole Court, That the said summ to be paid to the said Ann was not a Rent but a summ in gross, because reserved to a stranger, &c. Which see Litt. 79. And by Maunson Justice, If the words of the reservation had been twenty Nobles Rent, yet it had been but a summ in gross, but otherwise it had been by devise: Also there is not any condition for the payment of it, but only a Limitation for the word subsequent, which Limits the future use, takes away all the force of the words of the Condition, as 27 H. 8. 24. Land given in tail upon condition that the Donee and his Heirs shall carry the Standard of the Donor when he goes to battaile, and if he faile thereof, then the same to remaine to a stranger, the limiting of the Remainder hath taken away the conditions and hath controlled it, and now the condition is become a Limitation; But where the words subsequents are against Law, as if upon failer, that then it shall be lawfull for a stranger to enter, &c. these words because they are against Law (for a Rent cannot be reserved to a stranger, &c.) do not destroy the Condition by Mead, contrary by Mounson, for the Condition is utterly gon. And by Mead, Feoffment in Fee upon condition, That if the Feoffor shall doe such a thing that he shall re-enter and retain the Land to the use of a stranger, the use is void, and the Feoffor shall hold the Land to his owne use: A Feoffment in Fee upon condition, That the Feoffee shall marry my Daughter, and if he refuse to marry her, that then he shall be seised to the use of I S, the same is not a Condition, but a Limitation, and in all cases where, afterwards, of a Condition, an Interest is limited to a stranger, there it is not a Condition but a Limitation: And Meade said, That the said annuall summ is not demandable, but the party ought to pay it at his perill, Litt. 80. But by Mounson, it ought to be demanded, for so this word (Refuse) doth imply: And when at the Request of Ann the Feoffment is made, by Mounson, Meade, and Windham, the Rent is gon, but Dyer contrary, unlesse the Feoffment be made to Ann her selfe: And afterwards Judgment was given for the Plaintiff, Hill, 19 Eliz. Rot. 748. There was a Case betwixt Shaw and Norton. One Green devised his Lands to A, and devised also, the said A should pay a Rent to B, and that B might distraine for it, and if A faile of the payment of it, that the Heires of the Devisor might enter, the same is a good Distresse, and a good Condition. And by Mounson, Demand ought to be made of the Rent, for the words are (Refuse) which cannot be without Demand or Request: As it was certified, That such a Clerk refused to pay his Tenthes, and because it was expressely set downe in the certificate that he was requested, &c. for that cause he was discharged. And it was also holden, That if Request be necessary, that in this case, Request is to be made, That it ought to be made to the surviving Feoffee, or his heir, and not to the heirs of any of the Feoffees who are dead.

Rents.

Reversion.

Feoffments upon condition.

Regula.

Shaw and *Norton's* Case.

Hill.

Hill 25. *Eliz.* In the Kings Bench.

CCCLXIII. Lacyes *Case.*

Indictments.

LAcy was indicted of the death of a man upon Scarborough sands, in the County of York, between the high water-work, and the low water-work, and the same Indictment was removed into the Kings Bench, and being arraigned upon it, he shewed, that the said Indictment was shewed, by vertue of a Commission which issued the first day of May, directed to the Justices of Assize, and other Justices of the Peace in the said County, to enquire of all Murders, Felonies, &c. and pleaded further, That the second day of May aforesaid, issued another Commission directed to the Lord Admiral and others upon the Statute of 28 H.8.cap.15. by force of which the said Lacy was indicted of the same murder, whereof he was now arraigned, and the said last Commission was, ad inquirendam, tam super altum mare, quam super littus maris, & ubicunque locorum infra jurisdictionem nostram maritimam: And that the said Indictment taken before the Admirall, was taken before this, upon which he was arraigned, and upon the whole matter prayed to be dismissed: And the opinion of all the Justices was, that the first Commisson was repealed by the second, and so the Indictment upon which hee was arraigned, taken, coram non Judice, 10 E. 4. 7. If a Commission for the Peace issueth into one County, and afterwards another Commission issueth to a Town within the same County and parcell of it, the first Commission is repealed, which Gawdy granted, if notice be given, &c. but Wray denied it; but by the whole Court, by this last Commission to the Lord Admirall, the first Commission, as to the Jurisdiction, in locis maritimis is determined and repealed; for these two Commissions, are in respect of two severall authorities, the first Commission meerly by the Common Law, the other by the Statute aforesaid, and thereupon the party was discharged against the Queen, as to that Indictment. Note, that in the Argument of this Case, it was said by Coke, and agreed by Wray, That if a man be struck upon the high-sea, whereof he dieth in another County afterwards, that this murder is dispunishable, notwithstanding the Statute of 2 Ed.6.

Commission repealed.

Pasch. 25 *Eliz.* In the Kings Bench.

CCCLXIV. *The* Queen *and* Braybrookes *Case.*

THe Queen brought a Writ of Error against Braybrook, The Case was this, That King Ed.4. was seised of the Mannor of Marston, and gave the same to Lionel Lord Norris, and A.M. and the Heirs of the body of the Lord, the Remainder to H. Norris in Tail, L. and A. entermarrie, L. suffered a common Recoverie against himself onely, without naming the said A. Hen. Norris is attainted of high Treason by Act of Parliament, and by the same Act all his Lands, Tenements, Hereditaments, Rights, Conditions, &c. the day of the Treason committed, or ever after, &c. Hen. Norris is executed, Lionel dieth without issue, the Queen falsified the said Recovery for one moyety by Scire facias, because Anne who was joint-tenant with Lionel who was not named, and party to the said Recovery: and afterwards the Queen granted to the Lord Norris, Son of the said Hen. Norris, Manerium suum de Merston, & omnia jura sua in eodem, and now upon the said Recovery, the Queen brought a Writ of Error, and it was argued by Egerton the Queens Sollicitor, that this right to a Writ of Error is such a right as is transferred to the Queen by the Act of Parliament, for the words are, omnia jura sua quecunque, and here is a right, although not a present

right

right, yet a right although in futuro, ſo it is a right of ſome quality, as A. Tenant in Tail, the Remainder in Tail to B. A. makes a Feoffment in Fee, B. is attainted of high Treaſon, and by ſuch Act all his Lands, &c. given to the King. A. dieth without iſſue, the Queen ſhall have a Formedon in the Remainder, and although the Queen hath granted to the Lord Norris, Manerium ſuum de Merſton, & omnia jura in eodem, yet by ſuch generall words, a Writ of Error doth not paſſe, which See 32 H.8. br. Patents 98. And alſo this Action reſts in privity of record, and cannot be diſplaced from thence, but by Act of Parliament, ſee Br. Choſe in Action 14. 33 H.8. for when the King will grant a thing in Action, he ought in his Patent to recite all the circumſtances of the matter, as the Right, and how it became a Right, and becauſe the Queen here doth not make mention of this Right, as of the Entail, the Recovery, and the Attainder; for that cauſe the Right doth not paſſe. The Caſe betwixt Cromer and Cranmer, 8 Eliz. the Diſſeiſee was attainted of Treaſon, the Queen granted to the Heir of the Diſſeiſee all the Right which came unto her by the Attainder of his Anceſtor, nothing paſſed Cauſa qua ſupra: And always where the King grants any thing, which he cannot grant, but as King, that ſuch a grant without ſpeciall words, is to no purpoſe. Coke contrary, & he agreed the Caſe put by Egerton, for at the time of the Attainder, B had a Right of Remainder, but in our Caſe Hen. Norris had not any Right, but a poſſibility of a Right of Action, i.e. a Writ of Error; And he ſaid that this writ of Error is not forfeitable (for it is an Action which reſts in privity) no more than a condition in grolle, as a Feoffment in Fee is made upon condition of the party of the Feoffor who is attainted ut ſupra: This word (Right) in the Act of Attainder ſhall not transfer this Condition to the Queen, and of the Act of Attainder to Hen. Norris, it is to be conceived That the makers of the Act did not intend, that by the word (Right) every Right of any manner, or quality whatſoever ſhould paſſe to cary a Condition to the Queen, and therefore we ought to conceive, that the makers of the Act did not intend to touch Rights which reſted in privity: and as to the Grant of the Queen, to the Lord Norris of the Mannor of Merſton, Et omnia jura ſua in eodem, he conceived, that thereby the Right of the Writ of Error did paſſe; for it is not like Cranmers Caſe, but if in the ſaid Caſe, the Land it ſelf had been ſet down in the Grant, it had been good enough, as that Cranmer being ſeiſed in Fee of the Mannor of D was thereof diſſeiſed, and ſo being diſſeiſed was attainted of high Treaſon: now the Queen grants to his Heir totum jus ſuum in his Mannor of D, &c. and ſo in our Caſe, the Queen hath granted to the Lord Norris, Manerium ſuum de Merſton, & omnia jura ſua in eodem, &c. at another day it was moved by Plowden, that this Right of Writ of Error was not transferred to the Queen by the Act, but ſuch Right migh be ſaved to a ſtranger, &c. the words of the Act are, omnia jura ſua, and this word (ſua) is Pronomen poſſeſſionis, by which it is to be conceived, that no Right ſhould paſſe, but that which was a preſent Right, as a Right in poſſeſſion, but this Right to a Writ of Error, was not in Hen. Norris at the time of his Attainder, but it was wholly in him againſt whom the erroneous Judgement was had: and therefore if in a Præcipe quod reddat, the Tenant vouch and looſeth, and Judgement is given, and before Execution, the Tenant is attainted by Act of Parliament, by words ut ſupra, and afterwards he is pardoned, the Demandant ſueth for Execution againſt the Tenant, now notwithſtanding this Attainder, the Tenant may ſue Execution againſt the Vouchee, and afterwards Wray chief Juſtice openly declared in Court, the opinion of himſelf and all his companion Juſtices, and alſo of all the other Juſtices to be, That by this Act of Parliament, by which all Lands, Tenements, Hereditaments, and all Rights of any manner and quality whatſoever Hen. Norris had, the day of his attainder, or ever after, Lionel then being alive, and over-living the ſaid Hen. Nor-

ris

ris, that this Writ of Error was not transferred to the Queen: And that the said Act by the words aforesaid could not convey to the King this possibility of right, for at the time of the Attainder, the Right of the Writ of Error was in Lyonel and Hen. during the estate tail limited to Lyonell; had not to do with the Land, nor any matter concerning it: And Judgement was given accordingly; And it was holden, That he in the Reversion, or Remainder upon an Estate tail might have a Writ of Error by the common Law, upon a Recovery had against Tenant in tail, in Reversion.

CCCLXV. *Mich.* 25, & 26. *Eliz.* In the common Pleas.

Copy-holder. IN Trespasse brought by a Copy-holder against the Lord for cutting down and carrying away his Trees, &c. It was found by speciall Verdict, That the place where, &c. was Customary lands of the Plaintiffs, holden of the Defendant, and that the Trees whereof &c. were Cherry Trees, de magnitudine sufficienti essendi maremium, and that the place where they growed, was neither Orchard, nor Garden: It was said by the Court, That by the Custome the Copy-holder could not cut down such Trees, but the Lord might, and that the cutting down of such Trees which were not Waste, the Copy-holder might justifie without punishment: But because by the Verdict it did not appear that the Trees for which the Action was brought, were Timber in facto, but only, de magnitudine essendi maremium, the Plaintiff had Judgement.

Mich. 25, & 26. *Eliz.* *in the Common Pleas.*

CCCLXVI. *The Lord* Staffords *Case.*

Extent. UPon Recovery in debt against the Lord Stafford, certain Lands of the Lord were extended by Elegit; The Queen because the Lord Stafford was endebted unto her, by Prerogative ousted the Tenant by Elegit: Fleetwood Serjeant moved the Court in the behalfe of him who recovered, and surmised to the Court that the Queen was satisfied, and therefore prayed a Re-extent, but the Court would not grant it, because they were not certain of the matter, but advised the party to sue a Scire facias against the said Lord Stafford, to know and shew cause, why a Re-extent should not issue forth, the Queen being satisfied, &c.

Mich. 25. & 26. *Eliz.* In the Kings Bench.

CCCLXVII. Gibbs *and* Rowlies *Case.*

Tythes. SYmon Gibbs Parson of Beddington, Libelled in the Spirituall Court against Rowlie. for Tythe Milke, Rowlie upon surmise of a Prescription, de modo Decimandi, obtained a Prohibition, which was against Symon Gibbs, Rectorem Ecclesiæ parochial. de Nether Beddington, and the parties

Prohibition. were at Issue upon the Prescription, and it was found for Rowlie. Egerton Solicitor moved against the Prohibition, because the Libell is against Gibbs, Rectorem Ecclesiæ paroch. de Beddington, and the Prohibition was, de Nether Beddington, and it was not averred that Beddington in the Libell, and Nether Beddington, is unum & idem, & non diversa; It was said by the Court, That upon the matter there is not any Prohibition against Rectorem Ecclesiæ de Beddington

Beddington only, and therefore ſaid to the Plaintiffs Councell, let the Parſon proceed in the Spirituall Court at his perill.

Mich. 25. & 26. *Eliz.* In the Kings Bench.

CCCLXVIII. Ruſſell *and* Handfords *Caſe.*

RUſſell brought an Action upon the Caſe againſt Handford, and declared, Quod cum quoddam molendinum ab antiquo fuit erectum, upon ſuch a River, de quo, one Thomas Ruſſell whoſe Heir the Plaintiff is, was ſeiſed in his Demeſne of Fee, and dyed thereof ſeiſed, after whoſe death the ſame diſcended to the Plaintiff, by force of which the Plaintiff was ſeiſed in his Demeſne as of Fee, and ſo ſeiſed, The Defendant upon the ſame River had levyed a new Mill, per quod curſus aquæ prædict. coarctatus eſt, and upon Not guilty, It was found for the Plaintiff: It was moved in Arreſt of Judgement, That it is not layed in the Declaration, that his Mill had been a Mill time out of mind, &c. And then if it be not an ancient Mill time out of mind, &c. it was lawfull for the Defendant to erect a new Mill; And it was ſaid, That theſe words (ab antiquo) are not fit or ſignificant words to ſet forth a Preſcription, but the words, A tempore cujus contrarii memoria hominum non exiſtat. are the uſuall words for ſuch a purpoſe: See the Book of Entries 10, 11. See 11 H. 4. 200. If I have a Mill and another levyes another Mill there, and the Miller hinders the Water to run to my Mill, or doth any ſuch Nuſance, an Action lyeth without any Preſcription, as it ſeems by the Book in 22 H. 6. 14. The Plaintiff declared, That he was Lord of ſuch a Towne, and that he and all his Predeceſſors, Priors of N, Lords of the ſame Towne, have had, within the ſame Towne, four Mills time out of mind, &c. And that no other perſon had had any Mill in the ſaid Town, but the Plaintiff and his Predeceſſors, the ſaid four Mills, and that all the Tenants of the Plaintiff within the ſame Towne, and all other Reſiants there, &c. ought, and time out of mind, &c. had uſed to grind at the ſaid Mills of the Plaintiff, and that the Defendant, one of the Tenants of the Plaintiff, had erected and ſet up a Horſe Mill within the ſaid Towne, and there the Reſiants grinded, &c. And it was holden, That paradventure upon ſuch matter an Action lyeth, becauſe the Defendant being one of the Tenants of the Plaintiff is bound by the Cuſtome and Preſcription, ſo as he hath offended againſt the privity of the Cuſtome and Preſcription. And as to the Caſe in queſtion, It was the opinion of all the Juſtices, That if the Mill whereof the Plaintiff hath declared, be not an Amercement Mill, that this Action doth not lye upon the matter, eo quod curſus aquæ coarctatur: But yet at laſt, it was holden by the Court to be good enough, notwithſtanding the Exception, another Exception was taken to the Declaration, becauſe that here is ſet forth the ſeiſin of the Father of the Plaintiff, and the Diſcent to the Plaintiff by force of which he was ſeiſed in his Demeſne, &c. without ſhewing that after the death of the Father that he entred into the ſaid Mill, &c. ſo as no ſeiſin in fact is alleadged, but only a ſeiſin in Law, and if the Plaintiff was not ſeiſed in fact, he cannot puniſh this perſonall wrong, but the Exception was diſallowed, for ſuch a ſeiſin in Law is ſufficient for the maintenance of this Action. And afterwards the Plaintiff had Judgement to recover his Damages. See for the Action it ſelfe contained in the Declaration. 8 Eliz. Dyer 248.

Nuſance.

Words of Preſcription.

Seiſin in fact, and in Law.

Mich. 26. *Eliz.* In the Exchequer.

CCCLXIX. Cleypools *Case.*

Informations, upon the Statute of 5 *Eliz.* of Tillage.

Information in the Exchequer against Cleypoole, upon the Statute of Tillage, 5 Eliz. setting forth, That the Defendant hath converted three hundred Acres of arrable Lands of Tillage, to pasture, and the same conversion hath continued from 15 Eliz, unto the two and twentieth of Eliz: The Defendant as to the Conversion pleaded Not guilty, and as to the Continuance, the general pardon by Parliament, 23 Eliz. upon which the Attorny generall did demur in Law, It was argued, That that pardon did not extend to the continuance of the said Conversion: And first the Barons were of clear opinion, That if A be seised of Arrable Lands, and converts the same to pasture, and so converted, leaseth it to B, who continues it in pasture as he found it, he shall be charged by that Statute: And it is not any good Construction, where the Exception in the pardon is, excepting the converting of any Land from Tillage to Pasture, made, done, committed, or permitted, that the Conversion excepted out of the pardon shal be intended and construed the bare Act of Conversion, but the whole offence, i. the continuance and practise of it is understood: As if by generall pardon all intrusions are excepted, now by that, the instant Act of Intrusion, i. the bare Entry is not only excepted, but also the continuance of the Intrusion, and the perception of the profits: And note, The words of the Statute are (Conversion permitted) and Conversion continued is Conversion permitted: And the said Statute doth not punish the Conversion, but also the continuance of the Conversion, for the penalty is appointed for each year in which the Conversion continues: And Egerton Solicitor put this Case, 11 H. 8. It was enacted by 3 H. 7. cap. 11. That upon Recovery in Debt, if the Defendant in delay of Execution sues a Writ of Error, and the Judgement be affirmed, he shall pay damages, now the case was, That one in Execution brought such a Writ of Error, and the first Judgement is affirmed, he shall pay damages, and yet here is not any delay of the Execution, for the Defendant was in Execution before, but here is an Interruption of the Execution, and the Statute did intend the Execution it selfe, i. the continuance in Execution, ibidem moraturus quousque: It was said on the other side, That the conversion and continuance thereof are two severall things, each by it selfe, and so the conversion only being excepted in the pardon, the continuance thereof remaines in the grace of the pardon: And it appeareth by the Statute of 2, and 3. Ph. & Ma. That conversion, and continuance are not the same, but alia, atque, diversa, and distinct things in the consideration of the Law, for there it is enacted, That if any person shall have any Lands to be holden in Tillage according to the said Statute, but converted to Pasture by any other person, the Commissioners, &c. have authority by the said Statute to enjoyn such persons to convert such Lands to Tillage againe, &c. And in all Cases in the Law, there is a great difference betwixt the beginning of a wrong, and the continuance of it: As if the Father levyeth a Nusance in his own Lands to the offence of another and dyeth: An Assize of Nusance doth not lye against the Heir for the continuance of that wrong, but a Quod permittat, See F. N. B. 124, It was adjorned.

Mich.

Mich. 26. *Eliz.* in the Kings Bench.

CCCLXX. Powley *and* Siers *Case.*

POwley brought Debt against Sier Executor of the Will of A: The Defendant demanded Judgement of the Writ, for he said, That one B was Executor of the said A, and that the said B did constitute the Defendant his Executor, so the Writ ought to be brought against the Defendant as Executor of the Executor, and not as immediate Executor to the said A, the Plaintiff by Reply said, That the said B before any probate of the Will, or any Administration dyed, and so maintained his Writ. Wray Justice was against the Writ, for although here be not any probate of the Will of A, or any other Administration, yet when B made his Will, and the Defendant his Executor, the same is a good acceptance in Law of the Administration and execution of the first Will, for the Defendant might have an Action of Debt due to the first Testator: Gawdy and Ayliff Justices, The Writ is good: See Dyer, 23 Eliz. 372, against Wray. Debt.

CCCLXXI. *Pasch.* 26 *Eliz.* In the Kings Bench.

THe Case was: A seised of certain Lands, bargained and sold by Indenture all the Trees there growing, Habendum, succidendum, & exportandum, within twenty years after the date of the said Indenture, the twenty years expire; The Bargainee cuts down the Trees, A brought an Action of Trespasse for cutting down the Trees: And by Wray Justice, The meere property of the Trees vests in the Bargainee, and the Limitation of time which cometh after is not to any purpose but to hasten the cutting of the Trees within a certain time, within which, if the Vendee doth not cut them, thee should be punished as a Trespassor as to the Land, but not as to the Trees: Gawdy contrary; And that upon this Contract, a conditionall property vests in the Vendee, which ought to be pursued according to the direction of the condition, and because the condition is broken, the property of the Trees is vested in A. Bargaine and sale of Trees.

Pasch. 26 *Eliz.* In the Kings Bench.

CCCLXXII. Curriton, *and* Gadbarys *Case.*

IN an Action upon the Case, the Plaintiff declared, That the Defendant in consideration that the Plaintiff should make a lease for life to the Defendant of certain Lands, Habendum after the death of A, before the tenth of August next following, promised to pay to the Plaintiff ten pounds, the first day of May next after the promise which was before the tenth of August: And the truth was, That the said ten pounds was not paid at the day, ut supra, nor the said Lease made: And now both sides being in default, the Plaintiff brought the Action; It was said by Wray Justice, If the Plaintiff had made the Lease according to the consideration, and in performance thereof the action would have lyen, but now his own default had barred him of the Action: But for another cause, the Declaration was holden insufficient, for here is not any Consideration, for the promise is, in consideration that the Plaintiff shall lease to the Defendant for life, Habendum after the death of A, which cannot be good by way of lease, but ought to enure by way of grant of the Reversion, so as here is no lease, therefore no consideration, and notwithstanding Leases.

that if a Lease be made for life, Habendum after the death of A, the Habendum is void, and the Lease shall be in possession according to the Premisses, yet the Law will not give such construction to the words of a Promise, Contract, or Assumpsit, but all the words ought to be wholly respected according to the Letter, so as because that no lease can be made according to the words of the Consideration, no supply thereof shall be by any favorable construction: And so it was adjudged: But before the same imperfection was espied, Judgement was entred, and therefore, the Court awarded that there should be a cessat executio, entred upon the Roll, for it is hard as it was said by Wray to drive the party to a Writ of Error in Parliament, because Parliaments are not now so frequently holden as they have used to be holden, and the Executition was staid accordingly.

Pasch. 26 *Eliz.* In the Kings Bench.

CCCLXXIII. Willis *and* Crosbys *Case*.

Error. IN a Writ of Error, It was assigned for Error, That whereas in the first Action, the parties were at Issue, and upon the Venire facias one Gregory Tompson was returned; But upon the Habeas Corpora, George Tompson was returned, and the Jury was taken, and found for the Plaintiff, and Judgment given accordingly; It was argued on the part of the Plaintiff in the

Amercement. first Action, that the same is a thing amendable: As 9 E. 4. 14. A Juror was impannelled by the name of I B, and in the Habeas Corpora he was named W B, and by such name sworne, &c. And upon Examination of the Sheriff, it was found that he was the same person who was impannelled, and it was amended and made according to the Pannell; But the opinion of the whole Court was, That as this case is it was not amendable, and it is not like to the case of 9 E. 4. For there the Examination was before the Verdict when the Sheriff was in Court, but here it is after Verdict, and the Sheriff is out of Court, and cannot be examined, and for these causes, the Judgment was reversed.

Pasch. 26. *Eliz.* In the Exchequer.

CCCLXXIV. Ognell *and the Sheriffs of* Londons *Case*.

Escape. OGnell brought Debt upon an Escape by Bill in the Exchequer against the Sheriffs of London, the Case was, That one Crofts was bound to the now Plaintiff in a Recognisance, and afterwards committed for Felony to the Prison of Newgate, of which he was attainted, and remained in Prison in the custody of the Sheriffs: Afterwards Ognell sued a Scire facias upon the said Recognisance against Crofts, the Sheriffs returned, Cepi, and the especiall matter aforesaid, and after Judgment given against Crofts for Ognell, Crofts got his pardon, and escaped: It was argued, That notwithstanding this Attainder, Crofts is subject to the Execution obtained upon the Recognizance: See the case of escape betwixt Maunser and Annesley, 16 Eliz. in Bendloes case, 2 E. 4. 1. It is said by Watman, That a man outlawed for Felony shall answer, but shall not be answered: See 6 E. 4. 4, One condemned in Reddisslin, was taken by a Capias pro fine, and committed to Prison, and afterwards outlawed of Felony, the King pardons the felony, yet he shall remain in Execution, for the party if he will; But if the party be once in Execution for the party, & then outlawed of Felony, it seems by 6 E. 4. Fitz. Execution, 13. that the Execution is gon. And all the Barons were clear of opini-

on

on in the principall caſe for the Plaintiff. And they alſo ſaid, That if one who hath a Protection from the King, be taken in Execution, & Eſcape, the Gaoler ſhall anſwer for the Eſcape, and that was one Hales Caſe, And afterwards Judgment was given for the Plaintiff, and one of the cauſes of the Judgment was, becauſe, That the Sheriffs had returned, Cepi. upon the Proces. *Hales* caſe.

Hill. 26. *Eliz.* In the Kings Bench.

CCCLXXV. Biſhop *and* Redmans *Caſe.*

BIſhop, a Doctor of the Civill Law brought an Action of Covenant againſt Redman Archdeacon of Canterbury, and declared upon an Indenture, by which the Defendant did conſtitute the Plaintiffe Officialem ſuam of his Archdeaconry for three years, and gave to him by the ſaid Indenture, authoritatem admittendi, & inducendi quoſcunque Clericos ad quecunque beneficia Eccleſiaſtica infra Archidiaconatum predict. and alſo Probate of Wills, and further granted to him omnem & omnimodam Archidiaconatum juriſdictionem ſuam predict. abſque impetitione, denegatione, reſtrictione, &c. after which Doctor Young was created Biſhop of Rocheſter, which is in the Jurisdiction of the ſaid Archdeaconry, and the Defendant took upon him to enthronize the ſaid Biſhop in his ſaid Church, and took of him for his Fee twenty Nobles, whereupon the Plaintiff brought this Action, it was moved for the Defendant, that upon the matter the Action doth not lie; for the Office of enthronizing or inſtalling of a Biſhop doth not paſſe by the ſaid Indenture, nor is there any word in the Indenture, that doth extend unto it, for the Biſhop is not a Clark, and the Plaintiffe by the Indenture hath not to do but with clarks, not with Biſhops, and it appeareth by the Grant of Subſidies, by the Clergy in Parliament, that a Biſhop and a Clark are diſtinct things, See Inſtrumentum hereof. Prelatus et Clericus, &c. Alſo the Plaintiffe hath not to do with a Biſhoprick, but with Benefices, and a Biſhoprick is not a Benefice, but a higher thing: And further the Plaintiffe hath power to admit and induct, which doth not extend to inſtalling, or inthronization, for that belongs to a Biſhop, and the Court was clear of opinion, That by this Grant there did not paſſe any power to inſtall or inthronize Biſhops; and the generall words, i.e. omnem & omnimodam juriſdictionem Archidiaconatum predictam, did not mend the matter, for the word (predictam) doth reſtrain the words omnem, & omnimodam, &c. but admitting that; It was moved, If upon this Indenture Covenant lieth, for there is not any expreſſe Covenant, yet the words abſque impetitione, denegatione, reſtrictione, do amount to ſo much, to make the Defendant ſubject to his Action, if the matter in it ſelf would have ſerved for him, and ſo was the opinion of the Court. VVords which amount to Covenant.

Hill. 26 *Eliz.* In the Kings Bench.

CCCLXXVI. *Lady* Lodges *Caſe.*

THe Lady Laxton of London by her will bequeathed to Matthew Luddington, and Andrew Luddington, ſeverall Legacies in monies to be paid to them reſpectively at their ſeverall ages, &c. and made the Lady Lodge her Daughter her Executrix and died, Andrew died before his full age, Matthew took Letters of Adminiſtration of the goods of Andrew, and ſued the Lady Lodge in the Spirituall Court for the Legacy bequeathed to Andrew; before which Prohibition.

which Suit begins, the Lady Lodge, with Sir Thomas her Husband, gave all the goods which ſhe had as Executor of the ſaid Lady Laxton to Sir William Coxtell, Mr. of the Rolls, and to William Lodge, Sonne of the ſaid Sir Thomas and his Lady, depending which Suit the Lady Lodge died, after which ſentence was given againſt her being dead, and now a Citation was out of the Spirituall Court againſt William Lodge Executor of the ſaid Lady Lodge, to ſhew cauſe why the ſentence given againſt the ſaid Lady Lodge, ſhould not be put in Execution againſt him, and ſentence was given againſt the ſaid William Lodge who appealed to the Delegates, and there the ſentence was affirmed; And now came William Lodge into the Kings Bench, and ſet forth the grant of the ſaid Lady Lodge as aforeſaid, and that the ſame was not examinable in the Spirituall Court, and thereupon prayed a Prohibition: And Awbrey Doctor of the Civill Law, came into Court to informe the Juſtices, what their Law was in certain points touching the Caſe in queſtion; and as to the ſentence given againſt the Lady Lodge, after her death he ſaid, That if the Defendant dyed before Iſſue joyned, which is called Litis conteſtationem, the ſuit ſhall ceaſe, but if he dyeth after, Litis conteſtationem, it is otherwiſe, for in ſuch caſe the ſuit ſhall proceed, for after Litis conteſtationem, the right of the ſuit is ſo veſted in the Proctor, that he is a perſon ſuable untill the end of the ſuit: And alſo he reported their Law to be, That if a Legacy be bequeathed to an Infant to be paid when he ſhall come to the age of twenty one years, if ſuch a Legatory dyeth before ſuch age, yet the Executor or Adminiſtrator of ſuch Legator, ſhall ſue for the ſaid Legacy preſently, and ſhall not expect untill the time, in which if the Infant had continued in life, he had attained his full age. And as to the Prohibition it was argued by Egerton Solicitor Generall, That the grant aforeſaid is not tryable in the Spirituall Court: As if the ſaid Lady Lodge had ſuffered a Recovery to be had againſt her as Executor by Covin, &c. the ſame is not examinable in the Spirituall Court, but belongs to temporall Conuſans, and therefore he prayed a Prohibition: But on the other ſide it was ſaid, That if the Prohibition be allowed, the Legatory hath no remedy, but that was denyed, for the party might ſue in the Chancery: And after the Prohibition granted, the Court awarded a ſpeciall conſultation, quatenus non extendat ultra manus Executoris, & quatenus non agitur de validitate facti, i. the grant aforeſaid.

Note, it was adjudged contrary to this, *Mich. An. Dom.* 1653. in the Kings Bench. in *Doomlowes* Caſe.

Hill. 28 *Eliz.* In the Kings Bench.

CCCLXXVII. Huddy, *and* Fiſhers *Caſe.*

Debt. Attaint.

DEbt was brought upon a Bond, the Condition of which was for the performance of Covenants, Grants and Agreements in an Indenture; And in the Indenture it was recited, That in conſideration that the ſaid Huddy ſhould build a Mill upon the Land demiſed by the Defendant to the Plaintiff by the ſame Indenture, and a Water-courſe by the Land demiſed, the Defendant leaſed the ſaid Land to the Plaintiff, and the Leaſe was by the words Dedi & conceſſi: And the Plaintiff aſſigned the breach of the ſaid Covenant in Law, in that the Defendant had ſtopped the ſaid Water-courſe ſo made by the Plaintiff, upon which they were at iſſue, and it was found for the Plaintiff, upon which the Defendant brought Attaint, and the falſe oath was found, and it was moved in arreſt of Judgment, That here is no Iſſue, and then by conſequence no Verdict, and then no falſe oath, and then no cauſe of Attaint, for here the Iſſue is taken upon the ſtopping of the Water-courſe, which upon the ſhewing of the party is not any cauſe of action, for in the Indenture there is not any expreſſe Covenant, Clauſe, or Agreement,

ment, that the Lessee should enjoy the Water-course so to be made, only there is a Covenant in Law rising upon these words, Dedi & concessi, which cannot extend to a thing not in esse at the time of the making of the Indenture, i. Coke who argued for the Defendants in the Attaint resembled this case, to the case in 23 E. 3. Garr. 77. Where it is holden, that the warranty knit to the Manor shall not extend to the Tenancy escheated: And 30 E. 3. 14. The Recovery in value shall not be in larger proportion then the Land warranted was at the time of the warranty made: So in our case, this Covenant shall not extend to any thing which was not in esse at the time of the Covenant made: And see 25. Ass. 2. where the Court shall reject a Verdict or part of a Verdict, &c. And because the now Plaintiff might after the Verdict, have alleadged the same in arrest of Judgement which he did not, he shall not be helped by Attaint, but it shall be accounted his folly, that he would not for his own ease, and to avoid circuit of Action shew the matter in stay of Judgement: As 9 H 6. 12. by Littleton: If a man be Endicted of Felony, if the Judgement be insufficient, but he takes not advantage of it, but pleads the generall Issue, and is acquitted, he shall never after have a Writ of Conspiracy, &c. And for another cause Judgment ought not to be given in this Case, because it doth not appeare that Execution hath been sued, and then here is no party greived; And then this Action being conceived upon the Statute of 23 H. 8. Cap. 3. which gives it to the party greived, doth not lye, for a party greived cannot be intended without Execution sued: See 21 H. 6. 55. by Paston; False oath, Judgment, and Execution doe entitle the party greived to Attaint. And see the Statute of 23 H. 8. Enacts, That the party shall be restored to as much as he hath lost, therefore he ought to lose (by Execution) before he be a person able to bring this Action: But as to that matter, see the Statute of 1 E. 3. 6. by which it is Enacted, That the Justices shall not leave to take Attaint for the damages not paid, so as before the said Statute no Attaint lay before Execution, 33 H. 6. 21. by Prisoit 5. H. 7. 22. t. E. 1. Attaint, 70. 8. E. 2. Assize, 396. And it was moved, That for another cause the Attaint doth not lye, as it is pursued in Proces upon it, for the Plaintiff hath not pursued the Statute, upon which the Attaint is grounded, for the said Statute gives speciall Proces in this Case against the Petit Jury, Grand Jury, and the party, viz. Summons, Re-summons, and Distresse infinite, but in this Case the Plaintiff hath sued otherwise, which is against the direction of the Statute: And that was taken to be a materiall Exception by Clench and Gawdy Justices, for the Verdict doth not save the matter of Proces in this Case by the Statute of 18 Eliz. which doth not extend to proceedings in penall Causes; which see, by the words of the Statute, by an expresse Proviso: But Quære, If it be a penall Statute, because a lesser punishment is enacted by it, then that which was before inflicted upon such offenders: And as to the matter of Execution, Quære, If the Plaintiff be not pars gravata in hoc only, That he is subject to the said Judgment, and so lyable to Execution.

Hill 28 *Eliz.* In the Kings Bench.

CCCLXXVIII. Penruddock *and* Newmans *Case*.

Executions.

IN an Ejectione firmæ, the Plaintiff declared upon a lease made by the Lord Morley, and, upon Not guilty pleaded, this speciall matter was found, That William Lord Mountegle, seised of the Manor of D, whereof, &c. became bounden in a Statute in such a summ to A, who dyed, the Executors of A sued Execution against the said Lord, i. upon the Extendi facias, a Liberate issued forth, upon which the said Manor was delivered to the said Executors,

Executors, but was not returned, It was further found, That the said Executors being so possessed of the said Mannor, the said Lord commanded a Court Baron to be holden there, which was holden accordingly by the sufferance of the Executors, and the said Executors were also present, at which time the Executors in the presence of the said Lord, said these words, viz. We have nothing to doe with this Mannor; And upon this Verdict, two things were moved; If because the Liberate was not returned, the Execution was good: And as to that diverse Books were cited, 21 H. 6. 8. 18 E. 3. 25. And it was said that there was a difference, betwixt a Liberate, and a Capias ad Satisfaciendum, and Fieri facias, for these Writs are conditionall, Ita quod Habeas Corpus, &c. Ita, quod habeas denarios hic in Curia, 3 H. 7. 3. 16 H. 7. 14. But contrary in the Writ of Liberate, Habere facias seisinam, for in such Writs there is not such clause, and therefore if such Writs be not returned, the Execution done by virtue of them is good enough: And see 11 H. 4. 121. If the Sheriff by force of an Elegit delivers to the party the moyety of the Land of the Defendant, and doth not returne the Writ, if now the Plaintiff will bring an Action of Debt, de Novo, the Defendant may plead in Bar the Execution aforesaid, although the Writ of execution were not returned, and yet the execution is not upon Record: And see the case there put by Hanghford: And it is not like to the case of partition made by the Sheriff, the same ought to be returned, because that after the returne thereof, a new and Secondary Judgment is to be given, i. Quod partitio prædicta firma & stabilis maneat in perpetuum, firma & stabilis in perpetuum teneatur, see the Book of Entries, 114. And Egerton Solicitor, cited a case lately adjudged betwixt the Earle of Leicester, and the Widow Tansield, That such execution without returne was good enough. Another matter was moved: Admit, That here be a good execution, if now the Executors being in possession of the said Mannor by force of that Execution, and permitting and suffering the Consor to hold a Court there in the Mannor house, and saying in his presence the words aforesaid, if the same doth amount to a Surrender by the Executors to the said Consor or not. And Wray cheif Justice said, That here upon this matter is not any Surrender, for here the words are not addressed to the said Consor who is capable of a Surrender, nor to any person certain: And it is not like to the case of 40 E. 3. 23, 24. Chamberlains Assize, where Tenant for life saith to him in the Reversion, That his will is that he enter, the same is a good Surrender, for there is a person certain who can take it, but contrary in this Case, for here it is but a generall speech: It was adjorned.

Returne of the Sheriff.

Earle of *Leicester* and *Tansields* case.

Surrender.

Pasch. 28 Eliz. in the Common Pleas.

CCCLXXIX. Baskervile *and the Bishop of* Herefords *Case.*

Quare Impedit. IN a Quare Impedit by Walter Baskervile, against the Bishop of Hereford, &c. The Plaintiff counted, That Sir Nicholas Arnold was seised of the Advowson as in gross, and granted the same to the said Baskervile and others, to the use of himselfe for life, and afterwards to the use of Richard Arnold his Son in tail, Proviso, that if the said Nicholas dye, the said Richard being within age of twenty three years, that then the Grantees and their Heirs shall be seised to them and their Heirs untill the said Richard hath accomplished the said age: Nicholas dyeth, Richard being of the age of fourteen years, by force of which the Grantees were possessed of the said Advowson, and afterwards the Church became void, and so it belonged to them to present: And Exception was taken to the Count because the Plaintiff had not averred the life

life of Richard upon whose life the Interest of the Plaintiffs doth depend, And Gawdy Serjeant, likened it to the Case of the Parson which hath been adjudged, That where the Lessee of a Parson brought an Ejectione firmæ, and it was found for him, and in arrest of Judgment exception was taken to the Declaration, because that the life of the Parson was not averred, and for that cause Judgment was stayed: Anderson cheif Justice: Upon the dying of Sir Nicholas Rich being but of the age of fourteen years, an absolute Interest for nine years not determinable upon the death of Richard, or rather, they are seised in fee determinable upon the coming of Richard to the age of twenty three years: Rhodes and Windham contrary: That here is an Interest in the Grantees determinable upon the death of Richard within the Terme, for if Richard dieth without issue within the Terme, the Remainder is limited over to a stranger: And as to the Exception to the Count: It was argued by Puckering Serjeant, that the Count was good enough, for although the life of Richard be not expressely averred, yet such averment is strongly implyed and so supplyed: For the Count is, That dictus Nicholas obiit dicto Ric. being of the age of fourteen years, & non amplius, by force of which the Plaintiff was possessed of the said Advowson, quo quidem sic possessionato existente, the Church became void, and possessed he could not be, if the said Richard had not been then alive, and the same is as strong as an Averment: See 10 E. 4. 18. In Trespasse for breaking his close, the Defendant pleads, That A was seised, and did enfeoff him, to which the Plaintiff said, That long time before A had any thing, B was seised and leased to the said A at will who enfeoffed the Defendant, upon which B did re-enter, and leased to the Plaintiff at will, by force of which he was possessed untill the Plaintiff did the Trespasse, and the same was allowed to be a good Replication, without averring the life of B who leased to the Plaintiff at will, for that is implyed by the words, i. virtute cujus. the Plaintiff was possessed, untill the Defendant did the Trespasse: And see also, 10 H. 7. 12. In an Assize of common, The Plaintiff makes title, that he was seised of a Messuage, and of a Carve of Land, to which he and all those whose estate, &c. have had common Appendant, &c. And doth not say, that he is now seised of the Messuage: But this exception was disallowed by the Court, for seisin shall be intended to continue untill the contrary be shewed: It was adjorned. Averment.

Pasch. 28. *Eliz.* In the Exchequer.

CCCLXXX. Carys *Case.*

IN an Information in the Exchequer, by the Queen against Cary, the Case was this; A man grants scitum rectoriæ cum decimis eidem pertinent. Habend, scitum prædict. cum suis pertinentijs, for twenty years, the first Grantee dyeth within the Terme, If now because the Tythes are not expressely named in the Habendum, the Grantee shall have them for life only, was the question: It was moved by Popham Attorney Generall, That the Grantee had the Tythes but for life, and to that purpose he cited a Case adjudged, 6 Eliz. in the common Pleas: A man grants black Acre and white Acre, Habendum black Acre for life, nothing of white Acre shall passe but at will, and in the argument of that case, Anthony Browne put this case; Queen Mary granted to Rochester such severall Offices, and shewed them specially, Habendum two of them, and shewed which certain, for forty years, It was adjudged that the two Offices which were not mentioned in the Habendum, were to Rochester but for his life, and determined by his death: And so he said, in this Case, The Tythes not mentioned in the Habendum, shall be to Tythes.

the Grantee for life, and then he dying, his Executors taking the Tythes are Intrudors: But as to that, It was said by Manwood cheif Baron, That the cases are not alike, for the Grantees in the cases cited are severall, intire, & distinct things, which doe not depend the one upon the other, but are in grosse by themselves: But in our Cases, The Tythes are parcell of the Rectory, and therefore for the nearnesse betwixt them, i. the Rectory and the Tythes, the Tythes upon the mattter passe together with the scite of the Rectory for the Terme of twenty years, and Judgement was afterwards given accordingly.

Pasch. 26 *Eliz.* In the common Pleas, *Mich.* 27 & 28 *Rot.* 2432

CCCLXXXI. *The Lord* Darcy *and* Sharpes *Case.*

Debt.

THomas Lord Darcy, Executor of John Lord Darcy, brought Debt upon a Bond against Sharpe, who pleaded that the Condition of the Bond was, That if the said Sharpe did performe all the Covenants, &c. contained within a paier of Indentures, &c. By which Indentures the said John Lord Darcy had sold to the said Sharpe certian Trees growing, &c. And by the same Indentures Sharpe had covenanted to cut down the said Trees before the seventh of August, 1684. and shewed further, That after the sealing and delivery of the said Indenture, the said Lord Darcy now Plaintiff, caused and procured I S to raze the Indenture, quod penes prædict. Querentem remanebat, and of 1684. to make it, 1685. & so the said Indenture became void; And the opinion of the whole Court was clear against the Defendant, for the razure is in a place not material, and also the razure trencheth to the advantage of the Defendant himselfe who pleads it, and if the Indenture had become void by the razure, the Obligation had been single and without Defeasance.

Raisure of Deeds.

Pasch. 28 *Eliz.* In the commmon Pleas.

CCCLXXXII. Rollston *and* Chambers *Case.*

Costs, where damages are given.

ROllston brought an Action of Trespasse upon the Statute of 8 H. 6. of forcible Entry against Chambers, and upon Issue joyned it was found for the Plaintiff, and Damages assessed by the Jury, and costs of suit also, and costs also, de incremento, were andjudged; And all were trebled in the Judgement, with this purclose, quæ quidem damna in toto se attingant ad, &c. And all by the name of Damages: It was objected against this Judgment, That where damages are trebled, no costs shall be given, as in Wast, &c. But it was clearly agreed by the whole Court, That not only the costs assessed by the Jury, but also those which were adjudged, de incremento, should be trebled, and so were all the Presidents, as was affirmed by all the Preignothories, and so are many Books, 19 H. 6. 32. 14 H. 6. 13. 22 H. 6. 57. 12 E. 4. 1. And Book Entries, 334. and Judgment was given accordingly: And in this case it was agreed by all the Justices, That the party so convicted of the force at the suit of the party should be fined, notwithstanding that he was fined before upon Endictment for the same force.

Hill.

Hill. 29. *Eliz.* In the common Pleas. *Intrat. Trin.* 27 *Eliz. Rot.* 1606.

CCCLXXXIII. Jennor *and* Hardies *Case*.

The Case was, Lands were devised to one Edyth for life, upon condition that she should not marry, and if she dyed, or marryed, that then the Land should remaine to A in tail, and if A dyed without Issue of his body in the life of Edyth, that then the Land should remain to the said Edyth to dispose thereof at her pleasure: And if the said A did survive the said Edyth, that then the Lands should be devided betwixt the Sisters of the Devisor, A dyed without Issue living Edyth. Shutleworth Serjeant: Edyth hath but for life, and yet he granted, That if Lands be devised to one to dispose at his will and pleasure without more saying, That the Devisee hath a Fee-simple, but otherwise it is, when those words are qualified and restrained by speciall Limitation: As 15 H. 7. 12. A man deviseth, That A shall have his Lands in perpetuum, during his life, he hath but an estate for life, for the words (during his life) do abridge the Interest given before: And 22 Eliz. one deviseth Lands to another for life, to dispose at his will and pleasure, he hath but an estate for life: And these words, (If A dyeth without Issue in the life of Edyth, That then the Lands should remain to Edyth to dispose at her pleasure) shall not be construed to give to Edyth a Fee-simple, but to discharge the particular estate of the danger, penalty, and losse, which after might come by her marriage, so as now it is in her Libertie: And also he said, That by the Limitation of the latter Remainder, i. That the Lands should be devided betwixt the Daughters of his Sister, the meaning of the Devisor was not, that Edyth should have a Fee-simple, for the Remainder is not limited to her Heirs, &c. if A dyeth in the life of the said Edyth, for the Devisor goeth further, That if A overlives Edyth, and afterwards dyeth without Issue, that the said Land should be devided, &c. Walmesley contrary: And he relyed much upon the words of the Limitation of the Remainder to Edyth, Quod integra remaneat dictæ Edythæ, and that she might dispose thereof at her pleasure, for the said division is limited to be upon a Contingent, i. if A survive Edyth, but if Edyth survive A, then his intent is not that the Lands should be divided, &c. but that they shall wholly remain to Edyth, which was granted by the whole Court, and the Justices did relye much upon the same reason; And they were very clear of opinion, That by those words Edyth had a Fee-simple; And Judgement was given accordingly. Anderson conceived, That it was a Condition, but although that it be a Condition, so as it may be doubted, if a Remainder might be limited upon a Condition, yet this devise is as good as a new devise in Reversion upon the precedent Condition, and not as a Remainder, quod Windham concessit, but Periam was very strong of opinion, That it is a Limitation: Two Joynt-tenants of a Terme, A and B; A grants his part to B, nothing passeth by it, for, 's a grant, it cannot be good, for as one Joynt-tenant cannot enfeoff his Companion, no more can he vest any thing in him by grant, for he cannot grant to him a thing which he hath before; for Joynt-tenants are seised and possessed of the whole, all which was granted, per Curiam, and Anderson said, That if Lands be granted to A and B, and the Heirs of A, B cannot surrender to A, for a Surrender is as it were a grant; And as a Release it cannot enure, for a Release of a Right in Chattell cannot be without a Deed.

Hill. 29 *Eliz.* In the common Pleas.

CCCLXXXIV. Hollingshed *and* Kings *Caſe*.

Debt. HOllingſhed brought Debt againſt King, and declared, That King was bounden to him in a Recognizance of two hundred pounds before the Mayor and Aldermen of London, in interiori Camera de Guildhall London, upon which Recognizance the ſaid Hollingſhed heretofore brought a Scire facias before the ſaid Mayor, &c., in exteriori camera, and there had Judgment to recover upon which Recovery he hath brought this Action, and upon this Declaration, the Defendant did demur in Law, becauſe that in ſetting forth of the Recognizance he hath not alleadged, That the Mayor of London hath Authority by Preſcription or Grant to take Recognizances, and if he hath not, then is the Recognizance taken, Coram non Judice, and ſo void: And as to the Statute of Weſt. 2. cap. 49. It cannot be taken to extend to Recognizances taken in London, which ſee by the words, De his quæ recordat. ſunt coram cancellario Domini Regis & ejus juſticiarijs qui recordum habent, & in rotulis eorum irrotulatur, &c. And alſo at the time of the making of that Statute, London had not any Sheriffs, but Bayliffs, and the ſaid Statute ordains that Proces ſhall goe to Sheriffs, &c. But the whole Court was clear of a contrary opinion, for they ſaid, Wee will know that thoſe of London have a Court of Record, and every Court of Record hath an authority incident to it to take Recognizances, for all things which concerne the Juriſdiction of the ſaid Court, and which ariſe by reaſon of matters there depending. Another matter was objected, for that, The Recognizance was taken in interiori camera, but the Court was holden in exteriori camera, and therefore not purſuant: But as to that, It was ſaid by the Lord Anderſon, That admit that the Recognizance was not well taken, yet becauſe that in the Scire facias upon it, the Defendant did not take advantage then thereof, he ſhall be bounden by his ſaid admittance of it, as if one ſue forth a Scire facias as upon a Recognizance, whereas in truth there is not any Recognizance, and the party pleads admitting ſuch Record, and thereupon Judgment is given againſt him, it is not void, but voidable. Fleetwood Recorder of London, alleadged many Caſes to prove that the Courts of the King are bound to take notice, That they of London have a Court of Record, for if a Quo warranto iſſueth to Juſtices in Eyre, it behoves not them of London to claime their Liberties, for all Courts of the King, are to take notice of them: And at the laſt after many motions, the opinion of the Court was for the Plaintiff: And it was ſaid by Anderſon, and in a manner agreed by the whole Court, That if depending this Demurrer here, the Judgment in London upon the Scire facias be reverſed, yet the Court here muſt proceed, and not take notice of the ſaid Reverſall.

Priviledges of London.

Hill 29 *Eliz.* In the common Pleas.

CCCLXXXV. Bedingfeild *and* Bedingfeilds *Caſe*.

Dower. DOwer was brought by Anne Bedingfeild againſt Thomas Bedingfeild, The Tenant out of the Chancery purchaſed a Writ, de circumſpecte agatis, ſetting forth this matter, That it was found by Office in the County of Norfolke, that the Husband of the Demandant was ſeiſed of the Manor of N, in the ſaid County, and held the ſame of the Queen by Knights ſervice in

in cheif, and thereof dyed seised, the Tenant being his Son and Heire of full age, by reason whereof the Queen seised as well the said Mannor as other Mannors, and because the Queen was to restore the Tenements, tam integre, &c. as they come to her hands, it was commanded the Judges to surcease, Domina regina inconsulta: It was resolved, per Curiam, That although the Queen be entituled to have Primer seisin of all the Lands, whereof the Husband of the Demandant dyed seised, yet this Writ did not extend unto any Mannors not found in the Office, for by the Law, the Queen cannot seise more Lands then those which are contained in the Office: And therefore as to the Land not found by the Office, the Court gave day to the Tenant to plead in cheife: And it was argued by Serjeant Gawdy for the Tenant, That the Demandant ought to sue in the Chancery, because that the Queen is seised, to have her Primer seisin, and cited the case of 11 R. 2. and 11 H. 4. 193. And after many motions, It was clearly agreed by the Court, That the Tenant ought to answer over, for the Statute, De Bigamis Cap. 3. provides that in such case, The Justices shall proceed notwithstanding such seisin of the King, and where the King grants the custody of the Tenant himselfe, 1 H. 7. 18. 19. 4 H. 7. 1. A Multo fortiori against the Heire himselfe where he is of full age, notwithstanding the possession of the King for his Primer seisin, by the Statute of Bigamis after the Heire was of full age, the Wife could not be endowed in the Chancery: But now by the Prerogative of the King, such wives may be endowed there, Si viduæ illæ voluerint, and after many motions, The Court awarded, That the Tenant should plead in cheif, at his perill for the Demandant might sue at the common Law if shee pleased. Primer seisin.

CCCLXXXVI. *Hill.* 28. *Eliz.* In the common Pleas

THe Case was, The Husband was seised of Lands in the right of his Wife, the Husband and his Wife both joyned in exchange of the Lands with a stranger for other Lands, which exchange was executed, the Husband and the Wife seised of the Lands taken in exchange, altened the same by Fine, It was holden by Rhodes and Windham Justices, That the Wife after the death of her Husband might enter into her own Lands notwithstanding that Fine; And Rhodes resembled it to the case reported by my Lord Dyer, 19. Eliz. 358. The Husband after marriage assured to his Wife a Joynture, they both levy a Fine, Sur Conusans de droit come ceo que il ad, of the guift of the Husband; that the same is not any Bar to the Wife of her Dower, for the Election is not given to the wife to claim her Joynture, or her Dower, untill after the death of her Husband: And so in the principall case Judgement was given for the Wife. Exchange.

Pasch. 26. *Eliz.* In the Kings Bench.

CCCLXXXVI. Lees *Case.*

NIcholas Lee by his will devised his Lands to William his second Son; And if he depart this World not having issue; Then I will that my Sons in Law shall sell my Lands, the Devisor at the time of his devise having six Sons in Law, dyed, William had Issue John, and dyed, John dyed without Issue, one of the Sons in Law of the Devisor dyed, the five surviving Sons in Law sold the Lands: First it was clearly resolved by the whole Court, That although the words of the Will are (ut supra) If William Devises.

am my Son depart this world not having Issue, &c. And that William had Issue who dyed without Issue; here, although it cannot be litterally said, That William did depart this World not having issue, yet the intent of the Devisor is not to be restrained to the letter, that such construction shall be made, That whensoever William dyeth, in Law, or upon the matter without Issue, that the Land shall be subject to sale, according to the authority committed by the Devisor to his Sons in Law: And now upon the matter William is dead without Issue: As in a Formdon in Reverter or Remainder, although that the Donee in tail hath issue, yet if after the estate tail be spent, the Writ shall suppose that the Donee dyed without Issue, a fortiori in the Case of a Will, or Devise, such construction shall be made. As to the other point, concerning the sale of the Lands, Wray asked, If the Sons in Law were named in the Will, and the Clerks answered, No: See 30 H. 8. Br. Devise, 31. and 39. Ass. 17, Executors, 117. such a sale good in case of Executors: See also 23 Eliz. Dyer, 371. and Dyer 4, & 5. Phil. and Mary, Lands devised in tail, and if the Devisee shall dye without Issue, that then the Land shall be sold, pro optimo valore, by his Executors, una cum assensu A, if A dyeth before sale, the power of the Executors is determined: And afterwards it was clearly resolved by the whole Court, That the sale, for the manner, was good, and Judgment was given accordingly.

Pasch. 26 *Eliz.* In the Kings Bench.

CCCLXXXVIII. *Sir* Gilbert Gerrard *and* Sherringtons *Case.*

SIr Gilbert Gerrard Master of the Rolls, Libelled in the Spiritual Court, against Sherrington, and A his Servant for Tythes parcell of a Rectory, whereof the said Sir Gilbert was Fermor to the Queen; It was moved by Egerton Solicitor Generall, That against the Kings Fermor a Prohibition doth not lye: But the opinion of the whole Court was, That a Prohibition doth lye, and so it hath been adjudged before. And afterwards, Exception was taken to the surmise, because the said Sir Gilbert had Libelled against the said Sherrington and his Servant severally, and now in the Kings Bench they both had made a joynt surmise, whereas they ought to have severed in their surmises according to the severall Libells: And it was so adjudged by the Court, and therefore they were driven to make severall surmises: And afterwards Exception was taken, because the said Sherrington and his Servant, had delivered their surmises and suggestions by Attorney, where they ought to be in proper person: See the Statute of 2 E. 6. cap. 13. The party shall bring and deliver to the hands of some of the Justices of the same Court, &c. the true Coppy of the Libell, &c. subscribed or marked with the hand of the Party, &c. and under the Copy shall be written the surmise or suggestion; And although it was affirmed by the Clerks of the Court, that the common use and practise for twenty years had been, not to exhibite such surmises or suggestions by Attorney: Yet it was resolved by the whole Court, that it ought to be by Attorney.

Pasch.

Paſch. 26 *Eliz.* In the Kings Bench.

CCCLXXXIX. Short *and* Shorts *Caſe.*

IN an Action upon the Caſe upon Aſſumpſit to pay mony to the Plaintiff upon Requeſt: It was agreed, That the Plaintiff by way of Declaration ought to alleadge an actuall Requeſt, and at what place, and at what day the Requeſt was made: And it is not ſufficent to ſay, as in an Action of Debt, Licet ſæpius requiſitus, &c. and ſo it was adjudged. Requeſt,

CCCXC. *Paſch.* 26 *Eliz.* In the Kings Bench.

OPe was Endicted in the County of Lincolne upon the Statutes of of Weſt. 1. Cap. 33. and 2. R. 2. Cap. 5. of Newes, and the wozds were, That Campian was not executed foz treaſon, but foz Religion, and that he was as honeſt a man as Cranmer, the Bill was endozced, Billa vera, but whether, iſta verba prolata fuerunt, malitioſe, ſeditioſe, oz e contr. ignoramus: The ſame Indictment being removed into the Kings Bench, the party, foz the cauſes afozeſaid, was diſcharged. Indictment upon the Statute of newes.

Paſch. 26. *Eliz.* In the Kings Bench.

CCCXCI. Cole *and* Freindſhips *Caſe.*

IN Ejectione firmæ, the Caſe was, That Fricarrock was ſeiſed, and by Indenture betwixt himſelfe of the one part, and one Freindſhip, his Wife and the Childzen betwixt them begotten at the Aſſignment of the Husband of the other part, leaſed the ſaid Land to the ſaid Husband his Wife and their Childzen, at the Aſſignment of the Husband foz years, they having at the time of the ſaid Leaſe but one Childe, i. a Son, afterwards they had many Childzen, the wife dyed, the Husband by his will aſſigned his ſecond Son bozne after the making of the Leaſe, to have the reſidue of the ſaid Terme, and by the opinion of the Court nothing can come to the ſaid Son by that Leaſe, oz by that Aſſignment, foz if the Intereſt doth not veſt at the beginning, it ſhall never veſt; And afterwards it was moved, If in as much as nothing could veſt in any of the Childzen bozn after the Leaſe made, if theſe wozds (At the Aſſignment of the Husband) ſhould be void, and then the caſe ſhould be no moze, but that Land is deviſed to the Father and Mother, and their Childzen: At another day, viz. Trin. 26 Eliz. the caſe was moved again, and as to the firſt payment, the Court was of opinion as befoze, That the Child aſſigned after the Leaſe made, ſhould not take: And then it was moved, That becauſe Freindſhip and his Wife at the time of the making of the ſaid Leaſe had one Son that he ſhould take with his Father and Mother, and that the wozds (at the Aſſignment of Freindſhip) ſhould be void, is matter of ſurpluſage, and the wozd Childzen a good name of purchaſe: But the whole Court was againſt that conceit, foz theſe wozds in the caſe, at the Aſſignment of Freindſhip are not void, but ſhew what perſon ſhould take, if the intent of the party ſhould take effect, i. he who the Father by Aſſignment ſhould enable, foz no Child ſhall take but he who the Father ſhall aſſigne, that is part of the contract, and although by ſuch Aſſignment no title accrues to the Child aſſigned, yet without Aſſignment no child is capable, foz by the Leaſe the Father hath ſuch Liberty that he may aſſigne what child he will: And Leaſes, Aſſignments,

by

by Wray, If the words of the Lease had been (at the assignment of the Father within one moneth) and the Father surcease his moneth, the Interest should not vest in any of the Children: And by Ayliff Justice, If the words of the Lease had been (to the Husband and wife and their Son John, where his name is William) nothing should vest: And paradventure in this case at the Bar, if the Father had assigned his Son then borne, and had assigned him before or at the time of the Lease, i. the delivery of the Lease, it had been well enough: Note that this Action was brought by Cole Lessee of the Son of the Husband and Wife borne at the time of the Lease made: And afterwards Wray, with the assent of all the rest of the Justices, gave Judgment that the Plaintiff, Nihil capiat per Billam.

CCCCXII. *Pasch.* 26 *Eliz.* In the Kings Bench.

Execution where joynt, where several.

NOte, It was agreed by the whole Court and affirmed by the clerks: That if Debt be brought upon an Obligation against two upon a joynt Præcipe, and the Plaintiff hath judgment to recover, that a joynt Execution ought to be sued against them both: But if the suit were by one Originall and severall Præcipes, execution might be sued against any of them.

CCCXCIII. *Trin.* 26 *Eliz.* In the Kings Bench.

Replevin.

IN a Replevin, The Defendant doth avow per Damage Feasant, and shewed that the Lady Jermingham was seised of such a Mannor whereof, &c. and leased the same to the Defendant for years, &c. The Plaintiff said, That long before King H. 8. was seised of the said Mannor, and that the place where is parcell of the said Mannor demised and demisable by copy, &c. and the said King by his Steward demised and granted the said parcell to the Ancestor of the Plaintiff whose heire he is, by copy in fee, &c. upon which it was demurred, because by this Bar to the Avowry, the Lease set forth in the Avowry is not answered, for the Plaintiff in the Bar to the Avowry, ought to have concluded, and so was seised by the custome, untill the Avowant, prætextu of the said Terme for years entred: And so it was adjudged.

Trin. 26. *Eliz.* In the Kings Bench.

CCCXCIV. *The Lord* Dacres *Case.*

Stewardship of a Mannor: Office of Trust.

Grants *per Copy*, Deputy Steward.

IN Ejectione firmæ, the case was, That the Lord Dacres was seised of the Mannor of Eversham, and that I S held the place where of the said Mannor by copy for terme of his life, and the said Lord granted the Stewardship of the said Mannor to the now Marquesse of Winchester, who appointed one Chedle to be his Deputy to keep a court, & ad tradendum, the said Land (I S being now dead) to one Wilkins by copy for life, afterwards, the said Chedle commanded one Hardy his Servant to keep the said court, and grant the said Land by copy, ut supra, which was done accordingly, the copy was entred, and the Lord Dacres subsigned it and confirmed it: It was further found, That Hardy had many times kept the said court both before and after, and that the custome of the Mannor was, that the Steward of the said Mannor for the time being, or his Deputy might take Surrenders, and grant estates by copy; And if this estate so granted by Hardy were good or not, was the question, because by the Servant of the Deputy, whereas the custome found did not extend

tend further then the Deputy: It was argued that the eſtate granted, ut ſupra, was void, for a Deputy cannot transfer his authority over, for it is an office of truſt: See 39. H 6 33, 34. 14 E. 4. 1. and 6 Eliz. It was adjudged, That the Duke of Somerſet had diverſe Stewards of his Lands, and they, in the name of the ſaid Duke made diverſe Leaſes of the Lands of the ſaid Duke, reſerving Rent, and the Duke, afterwards aſſented to the ſaid Leaſes, and received the Rents reſerved upon them, and yet after the death of the ſaid Duke, the Earle of Hertford his Son and Heire avoided them: So here, the aſſent, and the ſubſignment of the copy by the Lord Dacres, doth not give any ſtrength to the copy which was void at the beginning; againſt which it was ſaid, That to take a Surrender, and to grant an eſtate by copy is not any judiciall Act, but meerly an Act of ſervice, and no matter of truſt is transferred to Hardy, for truſt is repoſed in him who may deceive, which cannot be in our Caſe, for here is an expreſſe commandment, which if Hardy tranſgreſſe it is abſolute void, for nothing is left to his diſcretion: And the admitting of a Copy-holder is not any judiciall Act, for there need not be any of the Suitors there who are the Judges: And ſuch a Court may be holden out of the Precinct of the Manor, for no Pleas are holden, which was conceſſam per totam Curiam: And by Ayliff Juſtice, If the Lord of ſuch a Manor makes a Feoffment of a parcell of his Manor which is holden by copy for life, and afterwards the Copy-holder dyeth, although now the Lord hath not any Court, yet the Feoffee may grant over the Land by copy againe. And the whole Court was clear of opinion, That the grant for the manner of it was good, eſpecially becauſe the Lord Dacres agreed to it; And Judgment was given accordingly.

Trin. 26. *Eliz.* in the Kings Bench.

CCCXCV. Burgeſſe *and* Foſters *Caſe.*

IN Ejectione firmæ, the caſe was, That the Dean and Chapter of Ely were ſeiſed of the Manor of Sutton, whereof the place where, &c. is parcell, demiſed and demiſable by copy according to the cuſtome, and by their Deed granted the Stewardſhip of the ſaid Manor to one Adams to execute the ſaid office, per ſe vel legitimum ſuum Deputatum eis acceptabilem: Afterwards Surrenders. Adams made a Letter of Deputation to one Mariot, ad capiendum unum ſurſum reddicionem, of one I W, and I his Wife, and to examine the ſaid I aforeſaid, ea intentione, that the ſaid I W and A might take back an eſtate for their lives, the Remainder over to one Joan Buck in Fee (Note, the Surrendor ought be, de duobus Meſſuagijs) Mariot took two ſeverall Surrenders from the ſaid Husband and Wife, the Remainder over to the ſaid John Buck in Fee, upon condition to pay a certain ſum of money, &c. I was moved, That the Surrender is void, and without warrant, for the warrant was, ad capiendum unum ſurſum reddicionem, and here are two ſeverall Surrenders, and ſo the warrant is not purſued, and then the Surrender is void: Another matter was becauſe the Remainder to John Buck by the words of the Deputation was abſolute and without Condition, and now in the Execution of it, it is conditionall, ſo as this conditionall eſtate is not warranted by the Deputation: But the whole Court was clear of a contrary opinion in both the points, and that all the proceedings were ſufficient and well warranted by the Deputation: Another matter was objected, becauſe that this Surrender and re-grant is entred in the Roll of a Court, dated to be holden the ſecond of Maij, and the Letter of Deputation beares date the third of June after: But as to that, The Court was clear of opinion, that the miſ-entry

of the date of the Court ſhould not prejudice the party, for this Entry is not matter of Record, but is but an Eſcape, and if the parties had been at Iſſue, upon the time of the Surrender made, or of the Court holden, the ſame ſhould not be tryed by the Rolls of the Mannor, but by the Country, and the party might give in Evidence the truth of the matter, and ſhould not be bound by the Roll, and according to this Reſolution of the Court, Judgement was given.

CCCXXI. *Mich.* 26, & 27. *Eliz.* In the Kings Bench.

Fines levyed.

THe Caſe was: Tenant in tail leaſed for ſixty years, and afterwards levyed a Fine to Lee and Loveday, Sur Conuſans de droit come ceo, &c. with a Render to him and his Heirs in Fee; And upon a Scire facias againſt the Conuſees, ſuppoſing the Lands to be ancient Demeſne, the Defendants made default for which the Fine was avoyded, and now the Iſſue in tail entred upon the Leſſee for years, and he brought an Ejectione firmæ, and it was found, That the Land was Frank Fee; And all the queſtion was, If by the Reverſall of the Fine by Writ of Diſceit, without ſuing forth a Scire facias againſt the Terr-Tenant ſhould bind him, or ſhould be void only againſt the Conuſee, and not againſt the Leſſee: Atkin. It ſhall not bind the Leſſee for years: For a Fine may bind in part, & in part not: as bind one of the Conuſees, and not the other, 7 H. 4. 111. A Fine levyed of Lands, part ancient Demeſne, & part at the common Law, the ſame was by Writ of Diſceit reverſed in part, as to the Land in ancient Demeſne, and ſtood in force for the reſidue, 8 H. 4. 136. And there by award of the Court iſſueth forth a Scire facias againſt the Terr-Tenants, and the Juſtices would not annul the Fine, without a certificate that the Land was Ancient Demeſne, notwithſtanding that the Defendant had acknowledged it to be ſo, but as to them who were parties to the Fine, the Fine is become void as to the ſaid parties, and he who had the Land before might enter, i. And he ſaid it ſhould be a great inconvenience, if no Scire facias, or other Proces ſhould be awarded againſt the Ter-tenant, for he ſhould be diſpoſed and diſinherited without privy, or notice of it, where upon a Scire facias, he might plead matter of diſcharge, and Bar of the Writ of Diſceit, as a Releaſe, &c. which ſee Fitz. N. B. 98. And ſo although the Fine be reverſed, yet he might retain the Land, and he reſembled this caſe to the caſe of 2 H. 4. 16, 17. In a contra formam collationis againſt an Abbot, a Scire facias ſhall iſſue forth againſt the Feoffee, and ſo by the ſame reaſon here: And for the principall matter he ſaid, That the Fine ſhould be avoided but againſt the parties, but not againſt the Leſſee: Kingſmill, The Scire facias brought againſt the parties only is good enough, for they were parties to the Diſceit, and not the Ter-tenants: It was adjorned.

Scire facias.

CCCXCVII. *Mich.* 26, & 27 *Eliz.* In the Kings Bench.

Error.

A Writ of Error was brought upon a Judgment in a Quid juris clamat, It was aſſigned for Error, that the Tenant did appeare by Attorney, whereas he ought not but in perſon becauſe he is to doe an Act in proper perſon, if it be not in caſe of neceſſity, where the Attorney may be received by the Kings Writ, or plead matter in Bar, of the Attornment, as if he claime Fee, &c. or other peremptory matter, after which Plea pleaded he may make Attorney, 48 E. 3. 24. 7. H 6. 69. 21 E. 3. 48. 1 H. 7. 27. Another Error was becauſe it is not ſhewed in the Quid juris clamat, what eſtate the Tenant hath: Another matter was, If the Grantee of the eſtate of Tenant in tail after poſſibility of iſſue extinct ſhall be driven to attorne, and it was ſaid

Appearance by Attorney.

said he should not, for the priviledge doth passe with the grant: See 43 E. 3. 1. Tenant in tail after possibility of issue extinct shall not be driven to attorne, 46 E. 3. 13. 27. Ergo, neither his Grantee: Williams contrary, As to the appearance of the Tenant by Attorney; because the same is admitted by the Court, and the Plaintiff, the same is not Error, which see 1 H. 7. 27. by Brian and Conisby, 32 H. 6. 22. And he said, That the Grantee should be driven to attorne, for no other person can have the estate of the Tenant in tail after possibility of issue extinct, but the party himselfe, therefore not the priviledge, and although he himselfe be dispunishable of Wast, yet his Grantee shall not have such priviledge. As if Tenant in Dower, or by the curtesie, grant over their estates, the Heire shall have Wast against the Grantors for Wast done by the Grantee, but if the heir granteth over his Reversion, then Wast shall be brought against the Grantees: See Fitz. N.B. 56. And if two Coparceners be, and the one taketh a Husband and dyeth the Husband being Tenant by the curtesie, a Writ of Partition lyeth against him, but if he granteth over his estate, no Writ of Partition lyeth against the Grantee, 27 H. 6. Statams Aid. Tenant in tail after possibility of issue extinct shall not have Aide, but his Grantee shall have Aid; Clark, The Grantee of Tenant in tail shall not be driven to attorne, If Tenant in tail grant totum statum suum, the Grantee is dispunishable of wast, so if his Grantee grant it over, his Grantee is also dispunishable, &c. It was adjorned.

If the Grantee of Tenant after possibility shall atturne.

Mich. 26 & 27: *Eliz.* In the Kings Bench.

CCCXVIII. Gravenor *and* Masseys *Case.*

GRavenor brought a Writ of Error upon a common Recovery against Massey: And in the said Recovery four Husbands and their Wives were vouched, and now the Plaintiff brought this Writ of Error as heir to one of the Husbands, and Exception was taken to his Writ, because the Plaintiff doth not make himselfe heir to the Survivor of the four Husbands. Egerton, The Writ is good enough, for there is a difference betwixt a Covenant personall, and a Covenant reall, for if two be bound to warranty, and the one dyeth, the Survivor and the heir of the other shall be vouched, and he said each of the four and their heirs are charged, and then the heir of each of them being chargeable, the heire of any of them may have a Writ of Error. And afterwards the Writ of Error was adjudged good: And Error was assigned because the Vouchees appeared the same day that they were vouched by Attorney, which they ought not to doe by Law, but they might appeare gratis the first day without Proces in their proper persons, and so at the sequatur sub suo periculo: See 13 E. 3. Attorn, 74. and 8 E. 2. ib. 101. Another Error was assigned Because the Entry of the warrant of Attorney, for one of the Vouchees is po. lo. suo, I D against the Tenant where it should be against the Demandant, for presently when the Voucher entreth into the warranty, he is Tenant in Law to the Demandant: Coke, As to the first Error, Although he cannot appeare by Attorney, yet when the Court hath admitted his appearance by Attorney, the same is well enough, and is not Error: As to the other Error, I confesse it to be Error, but we hope that the Court will have great consideration of this case as to that Error, for there are one hundred Recoveries erronious in this point, if it may be called an Error: And then we hope, to avoid such a generall mischeif, that the Court will consider and dispense with the rigor of the Law: As their Predecessors did, 39 H. 6. 30. In the Writ of Peine: But I conceive, That the Writ of Error is not well brought, for the Voucher in the said Recovery is of four Husbands and their Wives, and when Voucher shall be intended to be in

Error.

the right of their Wives, which see 20 H. 7. 1. b. 46 E. 3. 28. 29 E. 3. 49. And so by common intendment, the Voucher shall be construed in respect of the Wife; So also the Plaintiff here ought to entitle himselfe as this Writ of Error as heir to the Wife: And for this cause, The Plaintiff relinquished his Writ of Error; And afterwards he brought a new Writ, and entituled himselfe as heir to the wife.

Mich. 26 & 27 *Eliz.* In the Kings Bench.

CCCXCIX. *The Queen, and the Dean of* Christchurch *Case.*

Præmunire.

THe Queens Attorney Generall brought and prosecuted a Præmunire for the Queen, and Parret against Doctor Matthew Dean of Christchurch in Oxford, and others, because they did procure the said Parret to be sued in the City of Oxford, before the Commissary there in an Action of Trespasse, by Libell according to the Ecclesiasticall Law, in which suit Parret pleaded, Son Franktenent, and so to the Jurisdiction of the Court, and yet they did proceed, and Parret was condemned and imprisoned: And after that suit depended, The Queens Attorney withdrew the suit for the Queen; And it was moved, If notwithstanding that the party greived might proceed: See 7 E. 4. 2. b. The King shall have Præmunire, and the party greived his Action: See Br. Præmunire, 13. And by Brook none can have Præmunire but the King: Coke, There is a President in the Book of Entries, 427. In a Præmunire, the words are (ad respondendum tam Domino Regi, quam R. F) and that upon the Statute of 16 R. 2. and ibi. 428, 429. Ad respondendum tam Domino Regi de contemptu, quam dict. A. B. de damnis; But it was holden by the whole Court, That if the Kings Attorney will not further prosecute, the party greived cannot maintain this suit, for the principall matter in the Præmunire is, The conviction and the putting of the party out of the protection of the King, and the damages are but accessary, and then the principall being released, the damages are gon: And also it was holden by the Court, That the Presidents in the Book of Entries are not to be regarded, for there is not any Judgment upon any of the pleadings there, but are good directions for pleadings, and not otherwise.

CCCC. *Mich.* 26, & 27 *Eliz.* In the Kings Bench.

Fines levyed.

THe Case was, A gave Lands in tail to B upon condition, That if the Donee or any of his heirs alien, or discontinue, &c. the Land or any part of it, that then the Donor to re-enter: The Donee hath issue two Daughters and dyeth: One of the two Daughters levyeth a Fine, Sur Conusans de droit come ceo, to her Sister: Heale Serjeant, The Donor may enter, for although the Sisters to many intents are but one Heire, yet in truth they are severall Heirs, and each of them shall sue Livery, 17 E. 3. If one of the Sisters be discharged by the Lord, the Lord shall lose the Wardship of her, and yet the heire is not discharged: And if every Sister be heire to diverse respects, then the Fine by the one Sister is a cause of Forfeiture: Harris contrary, For conditions which goe in defeating of estates shall be taken shortly, and here both the Sisters are one heire, and therefore the discontinuance by the one, is not the Act of the other: Clench Justice, The words are, Or any of his heirs, therefore it is a forfeiture, quod fuit concessum per totam Curiam: And Judgment was given accordingly.

Forfeiture.

Conditions.

Mich.

CCCCI. *Mich.* 26, & 27 *Eliz.* In the Kings Bench.

THe Case was, A woman seised of a Rent-charge for life, took Husband, the Rent was arreare, the wife dyed, the Tenant of the Land charged; Promised to pay the Rent in consideration that the Rent was behind, &c. and some were of opinion, Because that this Rent is due and payable by a Deed, that this Action of the Case upon Assumpsit will not lye, no more then if the Obligor will promise to the Obligee to pay the mony due by the Obligation, an Action doth not lye upon the Promise, but upon the Obligation; But it was holden by the whole Court, That the Action did well lye, for here the Husband had remedy by the Statute of 32 H. 8. And then the consideration is sufficient, and so Judgment was given for the Plaintiff. Assumpsit.

Hill. 27. *Eliz.* In the Kings Bench.

CCCCII. Williams *and* Blowers *Case*.

REignold Williams and John Powell brought a Writ of Error against the Bishop of Hereford and Blower upon a Recovery had in a Writ of Disceit by the said Bishop and Blower against the said Williams and Powell, for that the said Williams had before brought a Quare Impedit against the said Blower and the Bishop, and had recovered against them by default, whereupon Williams had a Writ to the Metripolitan to admit his Clerke, and in the Writ of Disceit Judgement was given for the Plaintiffs; For it was found, That the Summons was the Fryday to appeare the Tuesday after, And so an insufficient Summons, and in that Writ of Disceit the Defendants, Williams and Powell pleaded, That Blower the Incumbent was deprived of his Benefice in the Court of Audience, which sentence was affirmed upon Appeal before the Delegates; and notwithstanding that Plea, Judgment was given against Williams and Powell Defendants in the said Writ of Disceit: And upon that Judgement, This Writ of Error is brought. Beaumont assigned four Errors, First, because the Bishop and Blower joyned in the Writ of Disceit, for their Rights are severall, 12 E. 4. 6. Two cannot joyne in an Action of Trespasse upon a Battery done at one time to them: So if one distrain at one and the same time, the severall Goods of diverse persons, they according to their severall properties shall have severall Replevins, 12 H. 7. 7. By Wood: So if Lands be given to two, and to the heirs of one, and they lose by default in a Præcipe brought against them, they shall have severall Writs, the one Quod ei deforceat, the other a Writ of Right: 46 E. 3. 21. A Fine levyed to one for life, the Remainder to two Husbands and their Wives in tail, they have Issue and dye, Tenant for life dyeth, the Issues of the Husbands and Wives shall have severall Scire facias's to execute the Fine by reason of their severall Rights: Lands in ancient Demesne holden severally of severall Lords are conveyed by Fine, the Lords cannot joyne in a Writ of Disceit, but they ought to have severall Writs, so here the Plaintiffs in this Writ of Disceit, and the Bishop claims nothing but as Ordinary, and he loseth nothing in the Quare Impedit, and therefore by the Writ of Disceit he shall be restored to nothing: The second Error was, Because the Bar of the Defendants in the Writ of Disceit was good, i. the deprivation, &c. and the Court adjudged it not good, for the Clerk being deprived, he could not enjoy the Benefice, if the Judgment in the Quare Impedit had been reversed, and where a man cannot have the effect of his suit, it is in vain to bring any Action; Lessee for the life of another loseth by Error. Joynder in Action. *Regula.*

by erronious Judgment, Cestuy que use dyeth, his Writ of Error is gon, for if the Judgment be reversed he cannot be restored to the Land, for the estate is determined. 31 E. 3. Incumbent, 6. The King brought a Quare Impedit against the Incumbent and the Bishop, the Bishop claimed nothing but as Ordinary; The Incumbent traversed the title of the King, against which, it was replyed for the King, That the Incumbent had resigned pendant the Writ, so as now he could not plead any thing against the title of the King, for he had not possession, and so could not counterplead the possession of the King: And here in our Case by this deprivation the Incumbent is disabled to maintain this Action of Disceit, 15 Ass. 8. If the Guardian of a Chappell be impleaded in a Præcipe for the Lands of his Chappell, and, pendant the Writ, he resigne, the Successor shall have the Writ of Error, and not he who resignes, for he is not to be restored to the Lands, having resigned his Chappell: So in our case, A deprivation is as strong as a Resignation. The third Error, because in the Writ of Disceit, it is not set forth that Blower was Incumbent, for the Writ of Disceit ought to containe all the spectall matter of the Case, as an Action upon the case, 4 E. 3. Disceit, 45. The fourth Error, That upon suggestion made after Verdict, that Blower was Incumbent, and in, of the presentment of the Lord Stafford, and that he was removed; and Griffin in by the Recovery in the Quare Impedit by default, a Writ to the Bishop was awarded without any Scire facias against Griffin, for he is possessor, and so the Statute of 25 E. 3. calls him, and gives him authority to plead against the King, and every Release, or Confirmation made to him is good, 18 E. 3. Confirmation made by the King after Recovery against the Incumbent is good; And 9 H. 7. If a Recovery be had in a Contra formam collationis, the possessor shall not be ousted without a Scire facias, so in Audita Querela upon a Statute Staple, Scire facias shall go against the Assignee of the Conusee, 15 E. 3. Respon. 1. See also, 16 E. 3. Disceit, 35. 21 Ass. 13. A Fine levyed of Lands in Ancient Demesne shall not be reversed without a Scire facias against the Ter-tenant: Walmesley contrary, The case at the Bar differs from the case put of the other side, for they are cases put upon Original Writs, but our case is upon a judiciall Writ, and here nothing is demanded but the Defendant is only to answer to the Disceit and falsehood: And in this Case the Issue is contained in the Writ which is not in any Originall Writ, and the Judges shall examine the issue without any plea or appearance of the Tenant, and here the Defendant is not to plead any thing to excuse himselfe of the wrong; And here the Judgment is not to recover any thing in demand, but only to restore the party to his former estate, and possession, and if he hath nothing, he shall be restored to nothing; And he put many cases where persons who have severall Rights may joyne in one Action, as a Recovery in an Assize against severall Tenants, they may joyne in one Writ of Error, 18 Ass. Recovery in Assize against Disseisor and Tenant, they shall both joyne in Error, why not also in Disceit: 19 E. 3. Recovery against two Caparceners, the Survivor and the heir of the other shall joyne in Error. As to the second Error, Williams and the Sheriff ought not to joyne in the Plea, and also the Plea it selfe is not good, for the Writ of Disceit is, That Williams answer to the Disceit, and the Sheriff shall certifie the proceedings and therefore he shall not plead: and also the Plea it selfe is not good, for although the Interest of the Incumbent be determined in the Church, yet his Action is not gone; as if in a Præcipe quod reddat, the Tenant alieneth pendant the Writ, and afterwards the Demandant recovereth, yet the Tenant although his Interest be gon by the Feoffment, yet he shall have a Writ of Error, and so here, and as to the Scire facias, there needs none here against the new Incumbent, for he comes in, pendant

Deprivation.

Scire facias.

vant the Writ, and that appears by the Record, but if he had been in before the Writ brought, then a Scire facias would lye: See 9 H. 6. It was adjorned.

Mich. 26, & 27 *Eliz.* In the Kings Bench.

CCCCIII. Flemmings *Case.*

Indictment upon Statute 1 *Eliz.*

FLemming was endicted upon the Statute of 1 Eliz. because he had given the Sacrament of Baptisme in other forme then is prescribed in the said Statute, and in the Book of common Prayer, and the said Indictment was before the Justices of Assize, Wray and Anderson, Of such offence done before, and now he is indicted againe, for which, It was awarded that he suffer Imprisonment for a year, and shall be adjudged, ipso facto, deprived of all his spirituall promotions: And upon the Indictment Flemming brought a Writ of Error, and assigned Error because in the second Indictment no mention is made of the first Indictment, in which case the second Indictment doth not warrant such Judgment: Wray Justice, If the first Indictment be before us, then is the second Judgment well given, contrary if it be before other Justices. Clench, The second Indictment ought to conceive the first conviction, and if one be indicted for a Rogue in the second degree, the first conviction ought to be contained in such Indictment, and in an Indictment the day and time are not materiall as to true recovering in facto: And it might be that this last Indictment was for the first offence for any thing appeareth: Coke who argued to the same intent, Compared it to the Case of 2 R. 2. 9. and 22 E. 4. 12. 12 H 7. 25. Indictment certified to be taken coram A B Justiciarijs Domini Regis ad pacem, &c. without saying, nec non ad diversas felonias, &c. is void, and if a man hath been once convicted, he shall not have his Clergy if it appeareth upon Record before the same Justices, that he had his Clergy before.

Hill. 27. *Eliz.* In the Kings Bench.

CCCCIV. *The Mayor of* Lynns *Case.*

Indictments.

THe Mayor of Lynn was Indicted for that he had received twenty four shillings of one A for giving of Judgment in an Action of Debt, depending before him against one B, and he was indicted thereof as of extortion, In contemptum dictæ Dominæ Reginæ, & contra formam Statuti: Coke, The Indictment is insufficient For there is not any Statute to punish any Judge for such a matter: For the Statute of West. 1. Cap. 26. is made against Sheriffs, Cap. 27. Clerks of Justices. Cap. 30. The Marshall and his Servants, Statute 23 H. 6. against Sheriffs, and other Statutes against Ordinaries; But no Action lyes against a Judge, for that which a Judge receives is Bribery and not Extortion. Et satis pœnæ est, judici quod Deum habeat ultorem, and therefore he said the party indicted ought to be discharged: Gawdy Justice, If in the Indictment there be words of Extortion or Bribery, although such an offence in a Judge be not materially Extortion, if these words contra pacem, &c. had been in the Indictment it had been good, quod Clench concessit: And afterwards the party was discharged.

Mich.

CCCCV. *Mich.* 28, *and* 29: *Eliz:* In the Kings Bench:

Crisp *and* Goldings *Case:*

Assumpsit. IN an action upon the Case by Crisp against Golding, the Case was, That a Feme sole was Tenant for life, and made a Lease to the Plaintiff for five years, to begin after the death of Tenant for life, and afterwards the 18. of October made another Lease to the same Plaintiff for 21 years, to begin at Michaelmas next before; and declaring upon all the said matter, he said, virtute cujus dimissionis, i.e. the later Lease, the Plaintiff entred and was possessed craft. Fest. S. Mich. which was before the Lease made, & further declared, that in consideration that the Plaintiff had assigned to the Defendant these 2 leases, the defendant promised &c. & upon non Assumpsit it was found for the Plaintiff and damages tared 600.l. Coke argued for the Plaintiff against the Sollicitor Generall, who had taken divers exceptions to the Declaration, i. Where two or many considerations are put in the Declaration, although that some be void, yet if one be good the action well lieth, and damages shall be tared accordingly, and here the consideration that the Plaintiff should assign totum statum, titulum, & interesse suum quod habet in terra prædict. 2. Exception, that the Lease in possession was made after Michaelmas, i. 18. October, and the Declaration is, virtute cujus dimissionis, the Defendant entred crastino Mich. and then he was a disseisor and could not assign his interest and right, which was suspended in the tortious disseisin, and so it appeared to the Judges, and he said there was not here any disseisin, although that the Lessee had entred before that the Lease was made; for there was an agreement, & communication before of such purposed and intended Lease, although it was not as yet effected, and if there were any assent or agreement that the Lessee should enter, it cannot be any disseisin, and here it appeareth that the Lease had his commencement before the making of the Lease, and before the entry: But put case it be a disseisin, yet he assigned all the Interest quod ipse tunc habuit, according to the words of the consideration, and he delivered both the Indentures of the said Demises, and quacunque via data, be the assignment good or void it is not materiall, as to the Action, for the consideration is good enough. Egerton Sollicitor contrary. In every action upon the Case, upon Assumpsit, there ought to be a Consideration, promise, and breach of promise, and here in our Case the Consideration is, the assignment of a Lease, which is to begin after the death of the Lessor, who was but Tenant for life, which is meerly void, and that appeareth upon the Record, and as to the second part of the Consideration, and the Assignment of the second Lease, it appeareth, that the Plaintiff at the time had but a Right; for by his untimely entry before the making of the Lease, he was not to be said Lessee, but was a wrong doer, &c. in 19 Eliz. in the Kings Bench, this difference was taken by the Justices there, and delivered openly by the Lord Chief Justice, i. When in Action upon the Case, upon Assumpsit 2 Considerations or more are layd in the Declaration, but they are not collaterall, but pursuant, as A. is indebted to B. in 100 l. and A. promiseth to B. that in Consideration that he oweth him 100 l. and in consideration that B. shall give to A. 2 s. that he will pay to him the said 100 l. at such a day, if B. bring an action upon the Case, upon this Assumpsit, and declares upon these two promises, although the Consideration of the 2 s. be not performed, yet the Action doth well lie: But if they be collaterall considerations, which are not pursuant, as if I in consideration that you are of my Councell, and shall ride with me to York, promise to give to you 20 l. in this case all the considerations ought to be proved, otherwise the Action cannot

cannot be maintained: So in our caſe, the conſiderations are collaterall, and therefore they ought to be proved, and afterwards judgement was given for the Plaintiff.

Hill. 28 *and* 29 *Eliz.* In the Common Pleas.

CCCCXLVI. Fooly *and* Preſtons *Caſe*.

IN an Action upon the Caſe, the Plaintiffe declared That whereas John Gibbon was bound unto the Plaintiff in quodam ſcripto obligatorio, ſigillo ſuo ſigillat. and coram, &c. recognito in forma Statuti Stapul. The Defendant in conſideration that the Plaintiffe would deliver to him the ſaid writing, to read over, promiſed to deliver the ſame again to the Plaintiff within ſix dayes after, or to pay to him 1000 l. in lieu thereof, upon which promiſe the Plaintiffe did deliver to the Defendant the ſaid writing, but the Defendant had not nor would not deliver it back to the Plaintiff, to the great delay of the Execution thereof, and the Defendant did demur in Law upon the Declaration; it was objected that here is no ſufficient conſideration appearing in the Declaration upon which a promiſe might be grounded, but it was the opinion of the whole Court, that the conſideration ſet forth in the Declaration was good and ſufficient, and by Anderſon, it is uſuall and frequent in the Kings Bench: if I deliver to you an Obligation to redail unto me, I ſhall have an action upon the Caſe, without an expreſſe Aſſumpſit, and afterwards judgement was given for the Plaintiff.

Hill 28. *and* 29. *Eliz.* In the Common Pleas.

CCCCXLVII. Wallpool *and* Kings *Caſe*.

Attachment in *London*.

WIlliam Wallpool was bound to King by Recognizance in the ſumme of 400 l. and King alſo was bound to Walpool in a Bond of 100 l. Walpool according to the Cuſtome of London, affirmed a Plaint of Debt in the Guildhall London againſt the ſaid King, upon the ſaid Bond of 100 l. and attached the debt due by himſelf to Wallpool in his own hands, and now King ſued Execution againſt the ſaid Wallpool upon the ſaid Recognizance, and Wallpool upon the matter of Attachment brought an Audita querela, and prayed allowance of it, and by Gawdy Serjeant, ſuch a Writ was allowed in ſuch Caſe, 26 Eliz. Anderſon at the firſt doubted of it, but at laſt the Court received the ſaid Writ de bene eſſe, and granted a Superſedeas in ſtay of the Execution, and a Scire facias againſt King, but ea lege, that Wallpool ſhould find good and ſufficient Sureties, that he would ſue with effect, and if the matter be found againſt him, that he pay the Execution.

CCCCXLVIII. *Hill* 28. *and* 24. *Eliz.* In the Common Pleas.

Copyholder. Surrender.

A Copy holder with license of the Lord leaſed for years, and afterwards ſurrendred the Reverſion with the Rent, to the uſe of a ſtranger, who is admitted accordingly. It was moved, if here need any Attornment, either to ſettle the Reverſion, or to create a Privity, and Rhodes and Windham Juſtices were of opinion, that the ſurrender and admittance are in the nature of an Inrollment, and ſo amount to an attornment, or at leaſt do ſupply the want of it.

Mich. 28 *Eliz.* In the common Pleas.

CCCCIX. Ruddall *and* Millers *Case.*

Devise. IN Trespasse, the Case was this, William Ruddall Serjeant at Law, 18 H. 8. made a Feoffment in Fee to diverse persons to the use of himselfe and his Heirs, and 21 H 8. declared his Will, by which he devised his Lands to Charles his younger Son, and to the Heirs males of his body, the Remainder to John his eldest Son in Fee, upon condition, That if Charles or any of his issue should discontinue or alien but only for to make a Joynture for their wives for terme of their lives, that then, &c. and dyed; The Statute of 27 H. 8. came, Charles made a Lease to the Defendants for their lives, according to the Statute of 32 H. 8. And levyed a Fine with Proclamation, Sur Conusans de droit come ceo, &c. to the use of himselfe and his wife, and the Heirs Males of their two bodyes begotten, the Remainder to himselfe and the Heirs Males of his body, the Remainder to the right Heirs of the Devisor, John the eldest Son entred for the Condition broken upon the Defendants, who re-entred, upon which Re-entry the Action was brought: Gawdy, Fleetwood, and Shutleworth Serjeants, for the Plaintiffs: This Condition to restrain unlawfull discontinuance is good, as a Condition to restrain Waste, or Felony: See 10 H. 7. 11. 13 H. 7. 23. And before the Statute of Quia Emptores terrarum: If A had enfeoffed B upon Condition, That B nor his Heirs should alien, the same was a good Condition by Fleetwood (which was granted per Curiam) And this Condition was annexed to good purpose, for the Serjeant knew well, That Cestuy que use might have levyed a Fine, or suffered a Recovery by the Statutes of 1 R. 3. 4 H. 7. And this Condition annexed or tyed to the use by the Will is now knit to the possession which is transferred to the use by the said Statute: Although it may be objected that the Condition was annexed to the use, and now the use is extinct in the possession, and by consequence the Condition annexed unto it, as where a Seignory is granted upon Condition, and afterwards the Tenancy escheats, now the Seignory is extinct, and so the Condition annexed to it; But as to that, it may be answered, That our Case cannot be resembled to the Cases at common Law, but rests upon the Statute of 27 H. 8. scil. Cestuy que use, shall stand and be seised, deemed and adjudged in lawfull seisin, estate and possession of and in such Lands to all intents, constructions, and purposes in Law, of and in such like estates as he had in the use, and that the estate, right, title, and possession that was in the Feoffee shall be clearly deemed and adjudged to be in Cestuy que use, after, such quality, manner, forme, and condition as he had in the use: And therefore in the common assurance by bargaine and sale by Deed enrolled, if such assurance be made upon Condition, As in case of Mortgage, the possession is not raised by the Bargainee, but by the Bargaine an use is raised to the Bargainee, and the possession executed to it by the Statute, and the Condition which was annexed to the use only is now consoyned to the possession, and so it hath been adjudged: So if the Feoffees to use before the Statute, had made a Lease for life, the Lessee commits Waste, the Statute comes, now Custay que use which was, shall have an Action of Waste, as it was adjudged in Justice Southcotes Case: So a Title of Cessavit in the Feoffees shall be executed by the Statute. So if the King grants to the Feoffees in use, a Faire, Market, or Warren, these things shall be executed by the Statute, as it was holden in the Case of Clarentius: As to the Condition, They conceived, That it is broken, for where the Devisor had allowed to the Devisee to discontinue for life, to make a

Conditions.

Southcotes case.

Clarentius case.

Joynture

Joynture to his Wife, now he hath exceeded his allowance, for he might have made a Joynture to his wife indefeiſable by Fine upon a Grant upon a Render for life, &c. But this Fine with the Proclamations is a Bar to the former entail which was created by the Deviſe, and hath created a new entail, and the former tail was barred by the Fine againſt the intent of the Deviſor: Alſo by this Fine he hath created a new Remainder, ſo as his Iſſue enheritable to this new entail, might alien and be unpuniſhed, which was againſt the meaning of the Deviſor: And as to the Leaſe for lives to the Defendants, the ſame is not any breach of the Condition, For that is warranted by the Statute of 32 H. 8. which enables Tenant in tail to make ſuch a leaſe, ſo as it cannot be ſaid a Diſcontinuance, which Anderſon and Periam granted: But the Fine levyed after is a breach of the Condition, and then the Re-entry upon the Leſſees, who have their eſtates under the Condition is lawfull: As where the wife of the Feoffee upon Condition is endowed, and afterwards the Condition is broken, now by the Re-entry of the Feoffor, the Dower is defeated: And Shutleworth put this caſe, A Feoffment is made upon Condition, That the Feoffee ſhall leaſe the Lands to A for life, and afterwards grant the Reverſion to B in Fee, the Feoffor may re-enter, for by this Conveyance he in the Reverſion is immediate Tenant to the Lord, where by the intended aſſurance, the particular Tenant ought to be. Puckering, Fenner, and Walmeſley contrary. And by Walmeſley, By this deviſe the uſe only paſſeth, and not the Land it ſelfe, for the Statute of 1 R. 3. extends only to Acts executed in the life of Ceſtuy que uſe, and not to deviſes which are not executed till after the death of the Deviſor, which ſee 4 Ma. Dyer 143. Trivilians Caſe, See alſo 6 E. 6. Dyer, 74. The Lord Bourchiers Caſe, but 10 H. 7. Ceſtuy que uſe deviſeth, That his Executors ſhall ſell the Land, now by the ſale of the Land in poſſeſſion, for the ſame is in a manner an Act in his life, for the Vendee is in by Ceſtuy que uſe, and here is a Condition, and not a Limitation, for the nature of a Condition is to draw back the eſtate to the Feoffor, Donor, or Leſſor, but a Limitation carryeth the eſtate further: And he conceived, That the Condition is not broken by this Act, for the intent of the Deviſor is purſued, for his meaning was, That the wife ſhould have a Joynture indefectible againſt the Iſſue in taile, and that the inheritance ſhould be preſerved; That both ſhould be obſerved; and he ſaid, that this Fine being levied by him in the Reverſion upon an eſtate for life, is not any diſcontinuance, but yet ſhall bar the eſtate Tail. And the Juſtices were clear of opinion, that the Condition is broken, and alſo that the intent of the Condition is broken, for it might be, that Charls had iſſue by a former wife, which by this Fine ſhould be diſinherited, and a new Entail ſet on foot againſt the meaning of the Deviſor, &c. and afterwards Judgement was given for the Plaintiffe.

Hill. 31. *Eliz. rot.* 355. In the Kings Bench.

CCCCX. Simmes *and* Weſcots *Caſe.*

IN an Action upon the Caſe, the Plaintiffe declared, That in conſideration, that he would marrie the Defendants Daughter, the Defendant promiſed, to give him 20 l. and alſo to procure him all the corn growing upon ſuch Lands, and to provide neceſſaries for the wedding dinner, the Defendant did confeſſe the communication betwixt them, and that he promiſed to give the Plaintiffe 20 l. ſo as he would procure a Leaſe of certain Lands to his Daughter for her life, abſque hoc, that he promiſed modo & forma: The Jury found the promiſe of the 20 l. but not any other thing, it was moved in arreſt of Judgement, that the Aſſumpſit whereof the Plaintiffe hath

declared, although it consist of divers things, yet it is entire, and if the whole is not found, nothing is found, and the Case of 21 E. 4. 22. was cited touching variance of Contract, as where an action of Debt is brought upon a Contract of a horse, and the Jury find a Contract for two horses, the Plaintiffe shall never have judgement; on the other side it was said, That the Plaintiffe shall recover damages for the whole that is found, i. e. for the 20 l. See 32 H. 8. br. Issue 90. In an action upon the Case, the Plaintiffe declared, that the Defendant did promise to deliver four woollen cloaths, the Defendant pleaded, That he did promise to deliver four linnen cloathes, absque hoc, that he promised, &c. the Jury found, That the Defendant did promise to deliver two woollen cloaths, and the Plaintiffe did recover damages for the two. So in Wast, the wast is assigned in succidendo 20 oaks, upon which they are at Issue, the Jury find but ten oaks, the Plaintiffe shall have Judgement for so much, and shall be amerced for the residue, Gawdy Justice. Here are severall Assumpsits in Law, as Br. 5. Ma. Action sur le Case 108. a man in consideration of a marriage assumes to pay 20 l. per annum for four years, two years incur, the party brings an action upon the case for the arrearages of the two years. Wray in an action upon the Case, the Plaintiffe ought not to vary from his Case, as if a promise be grounded upon two considerations, and in an action upon it, the Plaintiffe declares upon one onely, he shall never have Judgement, and here the Jury have not found the same promise. Clench. If promise be made to deliver a horse and a Cow, and the Horse is delivered, but not the Cow; the party shall have an Action for the Cow, but he shall declare upon the whole matter, and afterwards Judgement was given, quod querens nihil capiat per billam.

Regula.

Trin. 31. *Eliz.* In the Kings Bench.

CCCCXI. Stile *and* Millers *Case.*

A Parson Leased all his Glebe Lands for years, with all the profits and commodities, rendring 13 s. 4 d. pro omnibus exactionibus & demandis, and afterwards libelled in the Spirituall Court against his Lessees for the Tithes thereof, the Lessee obtained a Prohibition, See 32 H. 8 Br. Dis. 17. 8. E. 2. Avowry 212. Wray: Tithes are not things issuing out of Lands, nor any secular duty, but spirituall, and if the Parson doth release to his Parishioner all demands in his Lands, his Tithes thereby are not extinct, and afterwards a consultation was granted.

Tithes.

Trin. 31 *Eliz. rot.* 902. In the Kings Bench.

CCCCXII. Lee *and* Curetons *Case.*

IN Debt upon an Obligation, the Defendant pleaded non est factum, and it was found for the Plaintiffe, and Judgement given, & afterwards the Defendant brought error, & assigned for error that the Declaration was per scriptum suum obligat. without saying, hic in Curia prolat. to which it was answered by Coke, that the same was but matter of form which a judgement ought not to be reversed, for that the Clark ought to put in without instruction of the party, and so it was holden in a case betwixt Barras and King, M. 29. and 30 Eliz. Another error was assigned, because the judgement is entred, de fine nihil quia perdonat. where it should be quod capitatur, although the Plea were pleaded after the generall pardon, and for that cause the Judgement was

Debt.

Error.

was reverſed, for if the pardon be not ſpecially pleaded, the Court cannot take notice of it, as it was holden in Serjeant Harris Caſe.

Trin. 31 *Eliz.* In the Kings Bench.

CCCCXIII. Lacy *and* Fiſhers *Caſe.*

IN a Replevin, the taking is ſuppoſed in *S.* which Land is holden of the Mannor of Eſthall, the Defendant made Conuſans, as Bailiffe of the Lord of the Mannor aforeſaid, and iſſue was taken upon the Tenure, and it was tried by a Jury, out of the Viſne of Eſthall onely, Tanfield, The triall is not good, for the iſſue ought not to have been tried by both Viſnes, *S.* and Eſthall, for two things are in iſſue. If it be holden, or not. 2. If it be holden of the Mannor of Eſthall, for which cauſe the Viſne ought to be from both places, and the opinion of the Court was, That for the manner of it; it was not good, as if an iſſue be joyned upon common for cauſe of vicinage, it ſhall be tried by both Tenures, See 39 H.6.31. by Littleton and Danby, and the caſe in 21 E 3.12. was cited in a per que ſervitia, the Mannor was in one county, and the Lands holden in another county, the Tenant pleaded, that he did not hold of the Conuſor, and that he was tried by a Jury of the county where the Land was, See 2 H.4. Gawdy denied the book cited of 21 E.3. to be Law, and the reaſon wherefore the Viſne ſhall come from both places, is becauſe it is moſt likely, that both the Viſne may better know the truth of the matter, than the one onely. Another Exception was taken, becauſe the Conuſans (as it ſeems) is made according to the Statute of 21 H. 8.19. and yet the party doth not purſue the ſaid Statute through the whole Conuſans: for by the Statute in Avowry or Conuſans, the party needs not to name any perſon certain to be Tenant to the Land, &c. nor to make Avowry or Conuſans upon any perſon certain; and now in this Conuſans he hath not made Conuſans upon any perſon certain, but yet he hath named a perſon certain to be Tenant, &c. and in as much as this Conuſans is not made, either according to the Common-Law, or according to the Statute, it cannot be good, but that Exception was diſallowed by the Court, for if the Statute remedieth two things, it remedieth one, and the Conuſans made in form as above, was well enough by the opinion of the whole Court.

Triall.

Expoſition of Stat. 21 H. 8. *cap.* 19.

Trin. 31 *Eliz.* In the Kings Bench.

CCCCXIV. Dierſly *and* Nevels *Caſe.*

IN an Action of Treſpaſſe, the Defendant pleaded Non-guilty, and if he might give in evidence, That at the time of the Treſpaſſe, the Freehold was to ſuch an one, and he as his ſervant, and by his Commandement entred was the queſtion; and it was ſaid by Coke, That the ſame might ſo be well enough, and ſo it was adjudged in Trivilians Caſe; for if he by whoſe commandement he entreth hath Right, at the ſame inſtant that the Defendant entreth the Right is in the other, by reaſon whereof he is not guilty, as to the Plaintiffe, and Judgement was given accordingly.

Mich.

Mich. 29 *and* 30 *Eliz. rot.* 546. In the Kings Bench.

CCCCXV. Savage *and* Knights *Case.*

Error. A Writ of Error was brought upon a Judgement given in Leicester, in Debt. Tanfield assigned for Error, because in that suit there was not any Plaint, for in all inferiour Courts, the Plaint is as the Originall at the Common-Law, and without that no Processe can issue, and here upon this Record nothing is entred, but onely that the Defendant summonitus fuit, &c. and the first Entrie ought to be, A.B. queritur versus C &c. Clench Justice, a Plaint ought to be entred before Processe issueth forth, and this Summons which is entred here, is not any Plaint, and for that Cause the Judgement was reversed.

Trin. 31 *Eliz.* In the Kings Bench.

CCCCXVI. Rawlins *Case.*

IN Trespasse for breaking his Close by Rawlins, with a continuando, It was moved by Coke, that the Plaintiffe needed not to shew a Regresse to have Damages for the continuance of the first Entry, scil. for the mean profits, and that appears by common experience at this day, Gawdy Justice, whatsoever the experience be, I well knew that our books are contrary, and that without an Entry he shall not have damages for the continuance, if not in case where the Term or estate of the Plaintiffe in the Land be determined, and to such opinion of Gawdy, the whole Court did incline, but they did not resolve the point, because a Regresse was proved, See 20 H. 6. 15. 38. H. 6. 27.

Trin 31 *Eliz.* In the Kings Bench.

CCCCXVII. Harris *and* Bakers *Case.*

Accompt. Dammages. *Collet* and *Andrews* Case. IN an accompt dammages was given by the Jury, and it was moved that damages ought not to have been given by way of damages, but the damages of the Plaintiffe shall be considered by way of Arrearages, but see the Case, H. 29 Eliz. in the common Pleas, betwixt Collet and Andrews, and see 10 H. 6. 18. In Accompt the Plaintiffe shall count to his damage, but shall not recover damages, vide 2. H. 7. 13. 21 H. 6. 26. The Plaintiffe shall not recover damages expresly, but the Court shall adde quoddam incrementum to the Arrearages, Coke, It hath been adjudged, that the Plaintiffe shall recover damages ratione implacitationis, non Retentionis.

CCCCXVIII. *Mich.* 32 *Eliz.* In the Kings Bench.

THe words of the Statute of 32 H. 8. cap. 37 of Rents are, that the Executor of a Grantee, of a Rent-charge may distrain for the arrearages of the said Rent incurred in the life of the Testator, so long as the Land charged doth continue in the Seisin or possession of the Tenant in Demesne, who ought immediately to have paid the said Rent so behind to the Testator in his life, or in the Seisin or possession of any other person or persons

sons claiming the said Lands onely by and from the said Tenant, by Purchase, Gift, or Discent, in like manner as the Testator might or ought to have done in his life time. And now it was moved to the Court. If A grant a Rent-charge to B the Rent is behind, B dyeth, A infeoffeth C of the Lands in Fee, who diverse years after infeoffeth D, who divers years after enfeoffeth E. It was holden by Walmesey, Periam, and Windham Justice, against Anderson Lord chief Justice. that E. should be chargeable with the said arrearages to the Executors of A, but they all agreed, That the Lord by Escheat, Tenant in Dower, or by the courtesie, should not be charged, for they do not claim in by the party onely, but also by the Law. See before.

Hill. 32 *Eliz.* In the Common Pleas

CCCCXIX. Wigot *and* Clerks *Case.*

IN a Writ of Right by Wigot against Clark for the Manor of D in the County of Gloceſter, the four Knights gladiis cincti did appear, and took their corporall Oath, that they would choose 12,&c. ad faciendum magnam Assisam, and by direction of the court they withdrew themselves into the Exchequer chamber, and there did return in Parchment the names of the Recognitors, and also their own names, and at the day of the Return of the Pannel by them made, the 4 Knights and 12 others were sworn to trie the issue, and it was ordered by the court, That both the parties, scil. the Demandant and the Tenant, or their Attornies, attend the said 4 Knights in the Exchequer chamber, and to be present at the making of the Pannell, so as each of them might have their challenges, for after the return of the Pannell, no challenge lieth, and thereupon the said 4 Knights went from the Bar, and within a short time after, sitting the court, they returned the Pannell written in Parchment, in this form, Nomina Recognitorum,&c. inter A. petentem, & B tenentem, and so set down their names, six other Knights, ten Esquires, and four Gentlemen, and the Justices did commend them for their good and sufficient Pannel, and thereupon a Venire facias was awarded against the said parties. VVrit of Right.

Trin. 30 *Eliz. rot.* 611. In the common Pleas.

CCCCVXX Pory *and* Allens *Case.*

THe case was, That Lessee for 30 years, leased for 19 years, and then the first Lessee, and one B by Articles in writing made betwixt them, did conclude and agree, That the Lessee for 19 years should have a Lease for three years in the said Lands and others and that the same should not be any surrender of his first Term, to which Articles the said Lessee for 19 years did after agree and assent unto, and it was the opinion of all the Justices of the court, that the same was not any surrender, and they also were of opinion, That one Termor could not surrender to another Termor. Surrender.

Trin. 31 *Eliz. rot.* 321 In the commmon Pleas.

CCCCXXI. Glanvil *and* Mallarys *Case.*

GLanvil was Plaintiffe in Audita Querela, against Mallary upon a Statute Staple, for that the connsor was within age at the time of the acknowledging of it, it was moved for the Defendant, that the court ought not *Audita Querela.*

to

to hold Plea of this matter, becauſe there was no Record of the Statute remaining here, and therefore by Law he was compellable to anſwer it, &c. and a Preſident was ſhewed 5 H.8. where ſuch a pleading was allowed, and judgement given, that the Defendant eat ſine die, vide 16 Eliz. Dier 332. But on the other ſide divers preſidents were ſhewed, that divers ſuch Writs had been ſhewed in the common pleas, as 30 Eliz. Loves caſe, and the Lord Dudley and Skinners caſe, and thereupon it was adjudged that the Action did well lye in this court.

Loves Caſe.
Dudley and Skinners Caſe

Mich. 32 *Eliz.* In the common Pleas.

CCCCXXII. Pet *and* Callys *Caſe*.

Debt.

IN Debt upon a Bond for performance of covenants, the caſe was, I S by Indenture covenanted with I D that ſuch a woman, viz. R.S. at all times at the requeſt and charges of I. D. ſhould make, execute, and ſuffer ſuch reaſonable aſſurances of ſuch Lands to the ſaid I D or his heirs as the ſaid I. D. or his heirs ſhould reaſonably deviſe or require, I D deviſed a Fine to be levied by the ſaid Woman, and required her to come before the Juſtices of aſſiſe to acknowledge it, and the woman came before the ſaid Juſtice to that intent, and becauſe the ſaid woman at that time was not compos mentis, the ſaid Juſtice did refuſe to take the Conuſans of the ſaid Fine, & this was averred in pleading in an action brought upon the ſaid Bond for performance of Covenants, where the breach was aſſigned in the not acknowledging of the ſaid Fine, and upon the ſpeciall matter the party did demur in Law, and the opinion of the whole Court was, that the condition was not broken, for the words are generall to make ſuch reaſonable aſſurances which, &c. but if the words had been ſpeciall to acknowledge a Fine, there if the Juſtice doth refuſe to take ſuch acknowledgement, the Bond is forfeited, for the party hath taken upon him that it ſhould be done.

Mich. 22 *Eliz.* In the common Pleas.

Wangford *and* Sextons *Caſe*.

THe Plaintiff had recovered againſt the Defendant in an action of Debt and had execution: The Defendant after the day of the Teſte of the Fieri facias, and before the Sheriffe had meddled with the execution of the Writ, bona fide for money ſold certain goods and chattels, and delivered them to the buyers; it was holden by the Court, that notwithſtanding the ſaid Sale, that the Sheriffe might do execution of thoſe goods in the hands of the buyers; for that they are liable to the execution, and execution once granted or made ſhall have relation to the Teſt. of the Writ.

Execntions.

Trin. 29 *Eliz. rot.* 2715. In the common Pleas.

CCCCXXIV. Wilmer *and* Oldfields *Caſe*.

IN Debt upon a Bond, the Condition was to perform the Award of I.S. &c. the Arbitrators make Award, That the Defendant before ſuch a day ſhall pay to the Plaintiff 1000l. or otherwiſe procure one A, being a ſtranger to the Bond to be bound to the Obligee for the payment of 12 l. per annum to the plaintiffe for his life, the Defendant pleaded the performance of the Award generally

Award.

generally, the Plaintiff assigned the breach of the award in this, That the said A had not payd the said 100 l. without speaking of the cause of the award of the 12 l. per annum, upon which the Defendant did demur in law; it was holden by the whole Court, that the Replication was good, for the Award, as to the second point was meerely void, as if no such Award at all had been, because A was a stranger to the Award and the submission, but as to the point of the 100 l. the same is good, and shall bind the parties, and the plaintiffe had Judgement to recover, vide 21 E.4.75.18 E.4 22,23.

Mich. 31, *and* 32: *Eliz: rot.* 814. In the common pleas.

CCCCXXV. Fabian *and* Windsors *Case.*

IN Trespass for entring into his house or Inne at Uxbridge, it was found by speciall verdict, That the plaintiff leased to the Defendant the said house for seven years, rendring Rent at the Feasts of the Annunciation of our Lady and Saint Michael, &c. with condition, that if the said Rent shall be behind by the space of ten dayes, &c. that it shall be lawfull to the Lessor to re-enter: And afterwards at the Feast of the Annunciation, 31 Eliz. the Rent was behind, and the tenth day after the Lessor came to the said House a quarter of an houre before the sun setting and demanded the rent in these words, I demand three pound ten shillings for a halfe years rent of this House now due, and there continued untill the sun was set, but no rent was paid: But note, that the Issue was, If he came to the House halfe an houre before sun set, and there continued demanding the halfe years rent of the Premises due at the Feast of the Annunciation of our Lady then last past: It was moved by Fenner, That upon this Verdict the Issue is not found for the Plaintiff, i. the Issue was upon the halfe houre, & the quarter part of the houre was found, 2. the Issue was, If the demand were of the Rent due at the Feast of the Annunciation passed, and the Verdict is for rent due at the time of the demand, &c. And it was the opinion of Anderson, Periam; and Walmesley, That as to the first point the Verdict was good enough for the Plaintiff: Windham contrary: But it was agreed by them all, That if in demand of rent (ut supra) the Lessor, or any on his part doth demand one penny more or lesse then is due, or in his demand doth not shew the certainty of the rent, and the day of payment of it, and when it was due, the demand is not good, for a condition which goes in defeazance of an estate is odious in Law, and no re-entry in such Case shall be given, unlesse the demand be precisely and strictly followed.

Leases.

Demand of Rent.

Conditions taken strictly.

Mich. 32: *Eliz.* in the common Pleas.

CCCCXXV. Elmes *and* Medcalfes *Case.*

IT was holden for Law by the whole Court, That if one of the witnesses after the Jury are departed from the Bar, doth repeat unto the Jury the same Evidence which he gave before and no more, That that doth make the Verdict to be void.

Mich. 32 & 33 *Eliz.* In the common Pleas.

CCCCXXVII. Carter *and* Claycoles *Case.*

Leases.

IN Ejectione firmæ by Carter against Claycole, the Plaintiff declared upon a Lease made by the Wardens and Fellowes of All-soules College, 1. July, 10 Eliz. And it was found by speciall Verdict, That Overden Warden of the said College, and the Fellows, &c. leased unto the Plaintiff, To have and to hold from the Feast of the Annunciation next following, to the end of twenty years, and made a letter of Attorney to one, to enter into the said Manner, and to seale and deliver the Deed of the said Lease in their names to the Plaintiff, who by force thereof entred into part of the demised Premises, and there did seale and deliver the same, &c. But it was not found that any rent was reserved thereupon; And if this Lease were good; Then the Jury found for the Plaintiff, but if not, then for the Defendant: Cooper Serjeant, It hath been objected, That this Lease being but for twenty years, is not warranted by the Statute of 13 Eliz. Cap. 10. For the words of the Statute are, Other then for the term of 21. years, as to that, It was not the intent of the Statute, but only to abridge the great and long Leases heretofore made by Colledges, and to limit such Leases to a certain measure of time, ut supra, for twenty one years or three lives, & non ultra, but on this side as much as they would, which was granted by the whole Court: Another matter was because it is not found, That the due rent was reserved upon the said Lease (accustomed yearly rent or more) and yet the same is good enough, for if the other party will take advantage of such defect he ought to shew the same, otherwise it shall be intended, because it is found that such Lease was made, that it was made according to the Statute: For if a man is to make title to himselfe by a conditionall Lease, he is not to plead the condition, but only the Lease, and if the other party will defeate the Lease by the Condition, he shall shew the same. And in this Case, The Defendant also ought to have shewed the Statute, by which such defective Leases are made void: Also it hath been objected, That by the Statute of 18 Eliz the third part of the rent ought to be reserved in Corne, and here is not found any Corne, as to that, It is to be considered, That the said Statute is not a generall Law, whereof the Judges are bounden to take notice, but it ought to be pleaded, for it extends but to foure places, viz. Cambridge, Oxford, Winchester, and Eaton, and therefore such a Statute ought to be pleaded, or given in Evidence, and found by Verdict: As where a man pleads a generall pardon, in which divers persons are excepted, he ought to plead it specially, and shew, that he is not any of the persons excepted, 8 E. 4. 7. 28 H. 7. So speciall customes ought to be pleaded, Gavelkind, Borough-English, 21 E. 4. 55. 36. The King grants to the Cittizens of Norwich, &c. And afterwards by act of Parliament, all their Liberties, &c. are confirmed by a generall confirmation to all Cities and Boroughs, this is a speciall act, and ought to be pleaded; by Brian, 59, 13 E. 4. 8. The Lord Saies case, an act of Parliament, That all Corporations made by the King, H. 6. shall be void, is a speciall act, and ought to be pleaded: And see 28 H. 8. 27. & 28. Dyer. If the Statute of 21 H. 8. cap. 13 Of Lands taken to Ferme by Ecclesiasticall persons by a speciall Law: Yelverton contrary; The Statute of 13 Eliz. is a speciall Law and ought to be pleaded, but the Statute of 13 Eliz. is a generall Law which now see Hollands case, 39 Eliz. and Damports case, 45 Eliz. And this act of 13 Eliz. is generall in respect of time, for it extendeth to all time after (from henceforth) and to all persons to whom such Leases shall be made, the words of the Statute are, scil. To any person or persons

Speciall Statutes ought to be pleaded.

persons, in respect of persons who shall lease, all spirituall persons: Generall in respect of the end, which is the maintenance of learning, which extends to the common profit, &c. Drew Serjeant, That this act of 13 Eliz. is generall in respect of restraint only, but extends only to spirituall persons, and therefore ought to be pleaded, for otherwise the Court shall not take notice of it; As the Statute of 23 H. 6. of Sheriffs ought to be pleaded, which see in the Case of Dive and Manningham, Plowden, 64, 65. And although the Statute ought not to be pleaded, yet this Lease is not void against the Warden who made it, but against his Successor, although no rent be reserved upon it, notwithstanding that the perclose of the Statute be (utterly void and of none effect, to all intents, constructions, and purposes) So upon the Statute of 1 Eliz. concerning Leases made by Bishops, the Law hath been so taken in the case of the Bishop of Coventry and Leichfeild upon a Grant of the next Avoydance, That although it doth not bind the Successors, yet it shall bind the Grantor himselfe: So here this Lease being made by the present Warden and Fellowes of the Colledge aforesaid, although it be not sufficient to bind the Successor, yet it shall bind the Warden who made the Lease, Puckering contrary, And as to the case of 13 E. 4. 8. the reason there is, because there is an Exception in the said Statute of divers Grants made by King H. 6. and therefore the said Act ought to be specially pleaded: And see 34 H. 6. 34. by Prisoit: But in this Act of 13 Eliz. there is not any Exception, and although it be a generall Act with a Restraint, yet such an Act ought not to be pleaded, and therefore 27 H. 8. 23. In an action upon the Statute of 21 H. 8. for taking of Lands to Ferme by spirituall persons, he need not make mention of the Statute: And afterwards, the Justices did advise upon this point, whether the Lease be so void, That it be void against a stranger: So as the Defendant who doth not claime under the Colledge, and who hath no title to the Land may avoid it. And Periam Justice denyed the Case put by Puckering: A mortgages Lands to B upon a usurous contract for one hundred pounds, and before the day of payment B is ousted by C, against whom B brings an Action, C cannot plead the Statute of Usury, for he hath no title: For the estate is void against the Mortgagor. Another Exception was taken to the Declaration, because the Plaintiff hath declared, upon a Lease by the Warden and Fellowes, without naming any name of the Warden, 13 E. 4. 8. 18 E. 4. 8. In Trespasse the Defendant doth justifie, because that the Free-hold was in the Dean and Chapter, and he as Servant, and by their commandment entred; And Exception was taken to that Plea, because he hath not shewed the name of the Dean, scil. the proper name: So if a Lease be made by Dean and Chapter in these words, Nos Decan. & Capituli, the same Lease is void, which was granted by the Court: and 12 H. 4. 251. A Provost granted an Annuity by the name of Provost of such a Colledge, without any name of Baptisme, and afterwards, the Grantee brought a Writ of Annuity against the Successor of the said Provost; and by Hull, The Writ is well enough, but the Christian name ought to be set down in the Writ: So here, because that the name of Baptisme of the Warden is not in the Declaration, the same is not good: But the opinion of the whole Court was, That the Declaration is good enough, and they did relye especially upon the Book of 21 E. 4. 15. 16. Where Debt is brought by the Dean and Chapter without any Christian name, and the Writ holden good: Anderson: It stands with reason, That for as much as the Colledge was incorporated by the name of Warden and Fellowes, and not by any Christian name that they may purchase, and lease by such name without any Christian name, and may be impleaded, and implead others by such name, and as the Fellowes in such case need not to be named by their Christian names, no more ought the Warden: But of a Parson, Vicar, Chauntry Priest, it is otherwise, for in such case the name of Baptisme ought to be ad-

ded: It was also objected, That because the Letter of Attorney was to enter in the Mannor, and all the Lands and Tenements of the Colledge in such a Towne, and to seal the Indenture of Lease in the name of the Lessors, and to deliver it to the Plaintiff as their Deed, now the Attorney in executing of this Warrant hath not pursued it, for he hath only entred into the Lands, but it is not found, that he entred into the Mannor, and so the Lease is void: And it was said by Puckering, That if I lease two Acres in two severall Counties, rendring for the one Acre ten shillings, and for the other Acre ten shillings, and make a Letter of Attorney to make Livery in both, if the Attorney entreth into one Acre, and makes Livery, the same is void, for the Attorney hath not pursued his authority, for peradventure I would not have leased the Acre whereof Livery is made for such rent of ten shillings, being perhaps of greater value, but with the other Acre which was of lesser value, and so the mis-executing of my warrant shall prejudice me: Windham, Perhaps if one entire Rent had been reserved out of both Acres, it may be that by the Livery in one Acre, all is void; But by Puckering one entire Rent cannot be reserved upon such a Lease of two Acres in severall Counties: Walmesley denyed the Case put by Puckering, for the authority is executed well enough, for it doth not appeare upon the Verdict, but that the Colledge was in possession at the time of the Lease made, and then there needed not any such Entry, but the bare sealing and delivery of the Attorney is good enough: And also it doth not appeare by Verdict, That the Colledge hath any Mannor, and therefore, it shall be so intended, and then the case is no other but that, A man leaseth a Mannor, and certain Lands in D, and makes a Letter of Attorney to make Livery of them, where he hath nothing in the Mannor, and the Attorney makes Livery of the Land without medling with the Mannor, the same is a good Livery, and the authority duely executed: But if it had been expressely found, that the Colledge had such a Mannor there, then the Entry in the Land only, without medling with the Mannor, and the Livery made accordingly should not be good: But yet afterwards he seemed to be of other opinion. And as to that which hath been objected, That the Lease is void to all intents and purposes according to the words of the Statute (For by some it cannot be resembled to the case cited before, of the Bishop of Coventry and Leichfeild, that such a Grant should bind him and not his Successors) for if this Grant in our Case shall not be void presently, it shall never be void; for the Colledge never dyeth, no more then Dean and Chapter, Mayor & Commonalty: to that it was answered by Drew, That although there be some difference betwixt such Corporations, & that the words of the Statute are generall (void to all intents, constructions, & purposes) yet they shall be construed according to the meaning of the makers of the Act, whose scope was to provide for the Successors, and not for the present Incumbent, and to the utter impoverishing of all Successors, without any respect to the party himself, as it appeareth by the preamble of the said Statute, where it is observed, That by long and unreasonable Leases, the decay of spirituall livings is procured, for the remedying, and preventing of which long Leases this Act was made, and that the Successors should not be bound thereby: And these Leases are not void, simpliciter sed secundum quid, i. e. as to the Successors: As upon the Statute of 11 H. 7. cap. 20. Discontinuances made by weomen, &c. shall be void and of none effect, yet such a Discontinuance made is good against the woman her selfe: So upon the Statute of 1 Eliz. concerning Bishops; See now Coke, Lincolne Colledge Case, 37 Eliz. in the three Reports, 60. A Lease made by Dean and Chapter not warranted by the said Statute, shall not be void untill after the death of the Dean who was party to the Lease: So upon the Statute of 13 Eliz. of fraudulent Conveyances, such fraudulent Conveyance is not void against the Grantor, but against those who are provided for by the said Statute, and that the Lease in the principall case is not void but

but voidable, all the Justices agreed to be avoided by the Colledge, or any other who claim by it, and by Anderson, if such a Lease should be void, then great mischief would fall to the Colledge for whose benefit this Statute was made, for if such Lease be made rendring a small Rent, then if before the defect be found or espied, the Rent was arrear, the Colledge could not have remedy for the said Rent: Also by Periam, such a Lessee might have an Action of Trespasse against a stranger, who entreth upon the Land, which proves that the Lease is not void, but voidable, and afterwards notwithstanding all the Objections, Judgement was given for the plaintiffe, and the chief authority, which moved Periam Justice to be of such opinion, was Lemans case cited before, 28 H.8. Dyer 27. where a Lease was made to a Spiritual person against the Statute of 21 H.8. and a Bond or Obligation for performance of covenants, and thereupon an Action was brought, and the plaintiff therein had Judgement and recovered, which could not have been if the Lease were utterly void against the Lessor and Lessee, as the very words of the Statute are, and although it is not alledged in the book, that that was any cause of the Judgement, yet in his opinion it was the greatest cause of the Judgement in that case.

Pasch. 35 *Eliz.* In the common pleas.

CCCCXXVIII. Bighton *and* Sawles *Case.*

IN an Action upon the case, it was agreed by the whole Court, That where Judgement is given, that the plaintiff shall recover, and because it is not known what damages, therefore a Writ issueth to enquire of the damages, That the same is not a perfect Judgement before the damages returned and adjudged, and therefore they also agreed, that after such award, & before the damages adjudged that any matter might be shewed in Court in arrest of the Judgement, and by Periam Justice, the difference is, where damages are the principall thing to be recovered, and where not; for if damages be the principall, then the full Judgement is not given untill they be returned, but in Debt where a certain sum is demanded it is otherwise.

Pasch. 33 *Eliz.* In the common Pleas.

CCCCXXIX. Maidwell *and* Andrews *Case.*

Covenant.

MAidwell brought an Action of Covenant against Andrews, and the Case was this, That R. was seised of Lands, and leased the same for life, rendring Rent; and afterwards devised the Reversion to his wife for life, and died, Andrews the Defendant took to wife the wife of the Devisor, the Devisee of the Reversion, afterwards Andrews bargained and sold the said Reversion to one Marland and his heirs during his own life, and afterwards granted the Rent to the Plaintiffe, and covenanted that the plaintiffe should enjoy the said Rent during his Term, absque aliquo legitimo impedimento of the said Andrews his Heirs or assigns, or any other person, claiming from the said Marland. Marland died seised, and the same descended to B. his heir, and the breach of the Covenant was assigned, in this, i. in the heir of Marland, who hath the Rent by reason of the Grant of the Reversion to Marland ut supra, the Defendant pleaded the Grant of the Reversion to Marland, per scriptum (without saying, Sigillo suo sigillat. & hic in Curia prolat.) absque hoc, that the said Reversion and Rent descended to B. and thereupon the plaintiffe did demur in Law, and the causes of the Demurrer were assigned by Yelverton Serjeant. 1. The Grant of the Reversion

is

is pleaded per ſcriptum, and he doth not ſay (ſigillat.) for a Reverſion cannot paſſe without Deed, although it be granted but for years, and a bare writing is not a Deed without ſealing of it, and therefore the pleading ought to be per ſcriptum ſuum ſigillat. or per factum ſuum; for factum ſuum implies the enſealing and deliverie. 2. It ought to be pleaded hic in Cur. prolat. for the Court is to ſee ſuch Deed, to the end they may know, if it be a lawfull Deed, without raſure, interlining or other defects. 3. The Defendant hath traverſed the Deſcent, where he ought to have traverſed the dying ſeiſed, for of every thing deſcendable, the dying ſeiſed is the ſubſtance, and the Deſcent is but the effect: And although the Grant of the Reverſion was but for the life of the Grantor, yet the eſtate granted is deſcendable, as 27 E.3.31. Tenant by the Courteſie leaſeth his eſtate to one and his heirs, the Grantor dieth, his Heir entreth, and a good Bar againſt him in the Reverſion, and ſee 14 E.3. Action 56. Annuity granted to one and his Heirs for the term of another mans life, the Grantor dieth, living Ceſtuy que uſe, the Heir of the Grantor brings a writ of annuity, and it was holden Maintainable, and he ſaid, that where the dying ſeiſed is confeſſed and avoided by the other ſide, there the Deſcent is traverſable, and not the dying ſeiſed, and that was the Caſe betwixt Vernon and Gray. In an Avowry Vernon conveyed the Land from the Lord Powes, to him as next Heir to him, becauſe the Lord Powes died ſeiſed in his Demeſne as of Fee without iſſue, and the Plaintiff conveyed from the ſaid Lord Powes by Deviſe, and traverſed the Deſcent to the Avowant, for the dying ſeiſed was confeſſed and avoided by the Deviſe, 22 Eliz. Dyer 366. See 21 H.7.31. In Treſpaſſe the Defendant ſaith, That T was ſeiſed, and dyed ſeiſed, and that the Land deſcended to him as Son and Heir, and that he entred, the Plaintiff ſaid That T was ſeiſed, and took to wife K, and they had iſſue the Plaintiff, and dyed ſeiſed, and the Land deſcended to him, and traverſed the Deſcent to the Defendant, and ſee Sir William Merings Caſe, 14 H.8.22, 23. But if the parties do not claim by one and the ſame perſon, or the dying ſeiſed be not confeſſed and avoided, there the dying ſeiſed ſhall be traverſed, and not the Deſcent. Glanvil Serjeant, Be the Bar inſufficient or not, if the Declaration be not ſufficient, the Plaintiffe ſhall not have Judgement, and here is not any breach of Covenant, viz. that the Plaintiff ſhall enjoy it, without any lawfull impediment of the Defendant, his Heirs or Aſſignes, or any claiming by Marland, and then if the Heir of Marland cannot make any lawfull claim, then there is not any breach of Covenant aſſigned, and he ſaid becauſe it is not ſhewed, that the Land is not holden in Socage, the Deviſe is not good, for it may be that the Land is holden in Capite: but admit the Deviſe good, that when Andrews bargains and ſells unto Marland, and the Tenant never atturns, then nothing paſſeth, and then the Heir of Marland cannot make any lawfull claim or lawfull impediment. Periam Juſtice, Here Marland was aſſignee of Andrews, and if he or his Heir make claim, although that the aſſignment be not ſufficient in Law, yet becauſe he hath colour by this aſſignment, his claim is lawfull, and ſo there is a breach of the Covenant, and although it is not alledged, that the Land deviſed, is holden in Socage, yet the Deviſe is good for two parts of the Land. Anderſon Juſtice, If it be good but for two parts, then is the Reverſion apportioned, & the Rent deſtroyed, and ſo Marland hath not any Rent by his purchaſe of the Reverſion, and ſo he cannot lawfully diſturb the Plaintiffe, the Law doth create his apportionment, which grows by the Deviſe, and therefore the Rent ſhall not be deſtroyed, but if it had been done by the Act of the party, it had been otherwiſe, and I would willingly hear, if the Heir of Marland be aſſignee of Andrews, for otherwiſe he is not within the words of the Covenant, for Marland hath an eſtate to him and his Heirs for the life of another: now after the death of *M*arland, his Heir is a ſpeciall occupant, and

Traverſe.

Vernon and Grayes Caſe.

vide

vi. H. 26 Eliz. Rot. 560. in the Common Pleas, such an Heire shall not have his age.

Pasch. 23 *Eliz.* In the common Pleas.

CCCCXXX. Oglethorpe *and* Hides *Case.*

IN Debt upon a Bond for the performance of Covenants, it was holden by the whole Court, That if the Defendant pleaded generally, the performance of the Covenants, and the Plaintiff doth demur generally upon it without shewing cause of Demurrer; Judgement shall be given according to the truth of the cause, for that default in pleading is but matter of forme, and is aided by the Statute of 27 Eliz. But if any of the Covenants be in the disjunctive, so as it is in the Election of the Covenantor to doe the one or the other, then it ought to be specially pleaded, and the performance of it, for otherwise, the Court cannot know what part hath been performed. Debt.

Mich. 32 *Eliz.* In the common Pleas.

CCCCXXXI. Tracy *and* Ives *Case.*

IN Dower by Margaret Tracy against Ive, the Case was, That John Finch was seised and enfeoffed Shipton and others of two parts of the Lands to the use of himselfe and the Defendant his then wife, and their heirs for ever, with Condition, That if his said wife did survive him, she should pay such sums of mony not exceeding two hundred pounds, to such persons which the Feoffor by his last will should appoint, and afterwards he declared his Will, and thereby appointed certain summs of mony to be paid to divers persons, amounting in the whole to the sum of one hundred and fifty one pounds, and by his said Will devised the residue of his Lands to divers of his Kindred, having no issue, and dyed, The wife marryed Tracy, and they brought Dower against the Devisees, who pleaded the Feoffment aforesaid, and averred the same was made for the Joynture of the Demandant; And because that no other matter or circumstance was proved to verifie the Averment, the Court incited the Jury to find for the Demandant, which they did accordingly. Dower.

Mich. 32 *Eliz.* In the Common Pleas

CCCCXXXII. Bond *and* Richardsons *Case.*

IN Debt upon a Bond, the Condition was to pay a lesser sum such a day, and at such a place, the Defendant pleaded payment according to the Condition, upon which they were at issue; And it was found by Verdict, That the lesser sum was paid such a day before the day contained in the Condition of the Bond, and then received, and upon this Verdict Judgement was given for the Plaintiff, for the day is not materiall, nor the place, but the payment is the substance. Debt.

Trin.

Trin 32 *Eliz.* In the common Pleas.

CCCCXXXIII. Marſhes *Caſe.*

Trover and Converſion.

GOods came to a Feme covert by Treſver, and ſhe and her Husband did convert them to their own uſe, it was holden per Curiam, That the Action upon the Caſe, ſhall be brought againſt the Husband & Wife, and not againſt the Husband only, for the Action doth ſound in Treſpaſſe, and it is not like unto Detinue, for upon a Detainer by the Wife, the Action lyeth againſt the Husband only.

Trin. 32 *Eliz.* In the commmon Pleas.

CCCCXXXIV. Corbets *Caſe.*

Debt.

AN Action of Debt was brought by Originall Writ againſt an Adminiſtrator in another County, then where the Adminiſtrator was commorant, and before notice of the ſuit, he paid divers debts of the Inteſtate due by ſpecialty, and ſo he had not Aſſets to pay the debt in demand, having Aſſets at the day of the Teſte of the Originall; And now, the Defendant appearing, pleaded this ſpeciall matter, and concluded, ſo he had nothing remaining in his hands: And it was holden per Curiam, to be a good Plea. See 2 H. 4. 21. 22.

Pleinment Adminiſted.

Mich. 32 *Eliz.* In the common Pleas.

CCCCXXXV. Gillam *and* Lovelaces *Caſe.*

Adminiſtration.

KAtharine Gillam, Adminiſtratrix of John Gillam brought Ejectione firmæ againſt Leonard Lovelace, and upon not guilty pleaded, It was found for the Plaintiff; It was moved for the Defendant in arreſt of Judgement, That the Declaration was not good becauſe the granting of Letters of Adminiſtration is ſet forth in this manner, viz. Adminiſtratio commiſſa fuit Querenti per Willielmum Lewen Vicarium generalem in ſpiritualibus Epi. Rott. without averring, that at the time of the granting of the Letters of Adminiſtration, the Biſhop was in remotis agendis, for a Biſhop preſent in England cannot have Vicarium: But as to that, It was ſaid by the whole Court, That the Vicar generall in Spiritualibus, amounts to a Chancellor, for in truth the Chancellor is Vicar generall to the Biſhop: Another Exception was, becauſe the Declaration is not Epi. Rott. loci illius ordinarij, but that was not allowed, for all the Preſidents, and the courſe of the Court is, That by way of Declaration ſuch allegation needs not, but by way of War it is neceſſary: Another Exception was taken, becauſe the Plaintiff hath declared of an Ejectment, and alſo, quod bona & catalla ibidem invent. cepit, &c. And here, in the Verdict, the damages, as well for the Ejectment, as for the Goods and Chattells, are entirely taxed: It was adjorned.

Mich.

Mich 32. *Eliz.* In the commou Pleas.

CCCCXXXVI. Greeves *Case.*

IN a Replevin, the Defendant made Conusans of Bayliff to one Greeves and Rockwood, &c. and said, That A was seised of the Lands, and 6 Eliz. enfeoffed certain persons in fee to the use of his last Will, by which he willed, that his Feoffees should stand seised of the said Lands, untill the said Greeves had levyed of the profits of the said Lands, the sum of one hundred pounds: It was objected against this Conusans, that here is no devise, for A at the time of the devise had not any Feoffees, but the Exception was disallowed by the Court: And they cited the case of 15 Eliz. Dyer, 323. Lingens case, A made a Feoffment in fee to his use, and afterwards devised that his Feoffees should be seised to the use of his Daughter, that the same was a good devise of the Land: See 29 H. 8. Br. Devises, 48. Replevin. Devises.

Mich. 31 & 32 *Eliz.* In the common Pleas.

CCCCXXXVII. Kempton *and* Coopers *Case.*

IN Trespasse for breaking of his Close, the Defendant pleaded, that before this he had brought an Ejectione firmæ against the now Plaintiff and recovered, and had execution, &c. Judgment if Action, &c. And by Periam, Windham and Anderson Justices, the same is a good Bar, and the conclusion of the Plea is also good, Judgement if Action, without relying upon the Estoppell. Barr.

Mich. 32. *Eliz.* In the Kings Bench.

CCCCXXXVIII. Leigh *and* Okeley *and* Christmas *Case.*

OLiphe Leigh Fermer of the Queen of a Wood called Meerherst Wood in Warplesden in the County of Surrey, brought an Action of Trespasse against Henry Okeley and Robert Christmas for breaking of the said Wood, and therein entring and cutting down of two hundred loads of Wood, and carrying away the same, &c. The Defendants pleaded, And before the time in which the Trespasse was supposed, &c. That King H. 8. was seised of the Mannor of Warplesden, whereof the said Wood was parcell of which Mannor a Close called Withybod containing eleven Acres, eidem bosco adjacent. was parcell, and that the said Wood is, and time out of mind, &c. was closed and seperated with Hedges and Ditches, from the said eleven Acres which said Hedge and Ditches, per totum tempus prædict. fuerunt & ad huc sunt prædict bosco spectant. & pertinent. And that the said eleven Acres are, and time out of mind were customary Lands parcell of the Mannor aforesaid, and demised and demisable in Fee-simple; And that the said King H. 8. at a Court holden, 38 H. 8. by his Steward demised the said eleven Acres by copy, to John Goring and his Heirs, and that within the said Mannor there is this Custome, That every Copyholder, Tenant of the said eleven Acres, &c. have used and accustomed, per se vel servientes suos per eorum præcept. succidere, capere, & asportare subboscum in prædict. bosco in quo &c. pro reparatione prædictorum sepium & defensionum inter prædict. boscum in quo, &c. and the said eleven Acres, &c. quandocunque eædem sepes & defensiones in decasu extiterint, and shewed further, That at the time of Custome.

the Trespasse, &c. the said Hedges and Fences were in decay, and so justified: Upon which the Plaintiff did demur in Law: It was argued by Godfrey, That the Prescription is not good, for it appeareth, That this customary Land is contigue adjacens, to the said Wood, i. where the Trespasse was done: And of common Right the making of the Hedge doth appertain to the Owner of the Wood; And the Prescription is no more, but to take wood in the Lands of another, adioyning to my Land to make the Hedges of the same Land in which the wood groweth, which cannot be a good Prescription, for it sounds in charge, and not to the profit of him who Prescribes: Which see 22 E. 3. Prescription, 40. Trespasse against an Abbot, because where the Plaintiff was Farmor of the King of his Hundred of D. and by reason thereof he might make Attachment and distraine for the debts of the King within the said Hundred, and where for a certain debt the King he distrained the Beasts of one A, and the Abbot made Rescous, to which the Abbot said, That he was Lord of the Mannor of D, within which Mannor there was this custome, &c. That if any Distresse be taken within the said Mannor, that the same should be put into the Pound of the said Abbot of the same Mannor, and not driven out of the Mannor, and there ought the Distresse to remain three dayes, so that if the party would agree within the three dayes, that then he should have his Beasts, and he said, That the Plaintiff would have driven the said Beasts out of the said Mannor, and that he would not suffer him, upon which there was a demurrer, because it is not any profit to the Abbot but a charge to keep the Beasts of another: Also he said, That the King shall not be bound by such a custome as another person shall, whereupon Judgement was given for the Plaintiff: So here in the principall case, There shall be no damage to the Defendant if the wood be not fenced, for if his Cattell escape into the wood, he may justifie it, because it is in default of the Plaintiffs inclosure: And if the Beasts of the Plaintiff escape into the Lands of the Defendant, he may take them Damage Feasant, for the cause aforesaid, 21 H. 7. 20. A Custome is pleaded, That if any Tenants of the Mannor shall take the Cattle of any one Damage Feasant, and shall therefore distrain them, that then the Tenant so distraining them ought to bring them to the Lords Pound, which if he shall not doe, at the next Court, he shall be amerced in a certaine sum, to the Lord of the Mannor to be paid, and that was holden no good custome because it is against common right, and the common Law, for by the common Law, and common reason, every one finding Cattell in his own Lands Damage Feasants, may impound them in his own Land, and the Lord is not damnified thereby: So it is of a By-law, That every one who holdeth so many Acres of Lands in such a Towne, shall yearly pay a certaine sum of money to the Church of the same Towne, and shall forfeit for every default of payment thereof twenty pounds, such By-law, although it hath continued time out of mind, yet it is not of any validity, because for not payment of the said sum to the Church, the Lord of the Mannor is not damnified, and therefore he shall not have any gaine, contrary if the penalty had been limited to the Church-wardens, because they are bound to repaire the Church. Another Exception was taken to the forme of the Prescription (Quandocunque eædem sepes & defensiones in decasu exiterint) and that is too generall, for so they might be in decay by his own default, as if he himselfe wrongfully pull up the Hedges, in which case, there is no reason but that he should repaire them at his own costs, and charges, and therefore he ought to have pleaded, cum in decasu extiterint in the default of the Tenant of the wood. Another Exception was taken because that here, this custom is pleaded particularly, & appropriated to the eleven Acres only, and is not extended to the whole Mannor, and to that purpose, the case of 40 E. 3. 27. was cited where a custome is applyed to one part of a Towne, as to say that such a house within

within such a Towne is of the nature of Gavelkind, and the rest of the Towne is guildable: See 21 Eliz. Dyer, 363. It was adjorned, &c.

Hill 20. *Eliz.* In the Common Pleas.

CCCCXXXIX. Hare *and* Okelies *Case.*

MIchael Hare, and others, brought an Action of Trespasse against Okelie for breaking of their close, and carrying away of their corne; And upon Not guilty, It was found by speciall Verdict, That the said Michael Hare was sole seised of the said Close where, &c. & so seised, exposuit ad culturam, anglice, did put forth to Tillage the said Land to the other Plaintiffs in form following, viz. That the said Michael should find one halfe of the corne sowed, and the other Plaintiffs the other halfe, and that the said Land should be ploughed & tilled, and the Corn thereof coming should be reaped and cut, at the charges of the other Plaintiffs and so cut should be divided by the shock, and the said Michael to have the one halfe, and the other Plaintiffs the other halfe, &c. And it was the opinion of the whole Court, That notwithstanding these words (exposuit ad culturam) that no estate in the soile passed to the other Plaintiffs, but the said Michael did remaine sole seised as before, but by Anderson, upon the severance of the Corne, peradventure a property in the said Corne might be in all the Plaintiffs: But because it appeareth, That Michael was sole seised and the other Plaintiffs had not any thing in the Land: Therefore it was adjudged that they could not joyne in the Action of Trespasse for breaking of the Close, and therefore it was awarded by the Court, that the Plaintiffs nihil cap. per brevium.

Trespasse.

Exposition of words.

Trin. 30 *Eliz.* In the Common Pleas.

CCCCXL. Beares *Case.*

IN a Formdon by Beare, the Defendant pleaded in Bar, a warranty with Assets; And upon the Issue nothing by discent, it was found, That the Ancestor of the Defendant whose warranty was pleaded in Bar, was seised of Land in the nature of Gavelkind, and by his will devised the same to his two Sons (whereof the Defendant was the Eldest) and their heirs equally between them to be divided, and it was adjudged no Assets, wherefore the Defendant had Judgment to have seisin of the Land.

Formdon.

Bar.

Pasc. 30. *Eliz.* In the Kings Bench.

CCCCXLI. Austin *and* Smiths *Case.*

THe Case was, That Austin being a Copy-holder by License of the Lord leased his Copy-hold to Smith for years rendring rent, and afterwards by Deed granted the rent to another, to have during the Terme, &c. to which Grant the Lessee did attorne and payd the Rent to the Grantee: It was holden by Gawdy Justice, That the Grant was good, but now it is but a Rent-seck: And it was said by some, That the Lessor cannot surrender such a Rent, unlesse he surrender the Reversion also: Quere, if the Grantee may have an Action of Debt for it: It was conceived he could not, for he is not party nor privy to the Contract, nor hath the Reversion.

Copy-holder of Grants.

Rents.

Pasch. 31 *Eliz.* In the Kings Bench.

CCCCXLII. Underhill *and* Savages *Case.*

Savage was presented to a Benefice, and afterwards was presented to another, and then purchased a Dispensation (which was too late) and then was qualified, and afterwards accepted the Archdeaconry of Gloucester, And Underhill who had the Archdeaconry libelled in the Spirituall Court against the said Savage, where it is holden that all Ecclesiasticall Promotions in such cases are void, & now Savage sued a Prohibition. It was argued by Atkinson, That the Prohibition did lie, for the Patron hath his Remedy by our Law, by a Writ of Right of Advowson, See 29 E.3.44. If Avoidance be by Cession or deprivation, and the next presentment come in question, it shall be determined by the Kings Court, and here when he accepteth of another Benefice, it is cession by the Common-Law, but there ought to be a sentence, but now there needs not any sentence, for by the Statute of 21 H.8.13. the Church is ipso facto void. But it was objected, an Archdeaconry, is not within the Statute, for it is not any Cure with Souls: also an Archdeaconry is a late Promotion, and therefore it cannot be void by the Statute, Lewknor contra. The Patronage here doth not come in debate, but if the Defendant in the Spirituall Court will plead, That the Plaintiff is not Patron, but such an one, then a Prohibition lieth: withall the Justices granted, and it was said by Wray, that a Doctor of the civil Law had been with him, and affirmed to him, that their Law is, That if one having a Benefice with cure of Souls accepts an Archdeaconry, the Archdeaconry is void, but he said, that he conceived, that upon the Statute of 21 H.8. the Law is qualified by reason of a proviso there, scil. Provided that no Deanry, Archdeaconry, &c. be taken or comprehended under the name of a Benefice, having Cure of Souls, in any Article above specified.

Pluralities.

Prohibition.

Archdeaconry

CCCCXLIII. *Pasch.* 30 *Eliz.* In the Kings Bench.

One was bounden to stand to the award of two arbitrators, who award that the party shall pay unto a stranger or his assigns 200 l. before such a day, the stranger before the day dieth, and B takes Letters of Administration, and if the obligor shall pay the money to the Administrator, or that the obligor should be discharged was the Question, and it was the opinion of the whole Court, that the money should be paid to the Administrator, for he is assignee: and by Gawdy Justice, if the word assignee had been left out, yet the payment ought to be made to the administrator, quod Coke affirmavit.

Award.

CCCCXLIV. *Pasch* 30 *Eliz.* In the Kings Bench.

One sued in the Kings Bench for Costs given upon a Suit depending in the Hundred Court, & the sum of the Costs was under 40 s. and the Plaintiff declared, That at the Court holden before the Steward, secundum consuetudinem Manerii prædict. It was objected that the Steward is not judge in such Court, but the Suitors, to which it was answered by the Justices, that by a Custome in a Hundred Court a Steward may be Judge, and so it hath been holden, and here the Plaintiff hath declared upon the Custome, for the Declaration is secund. consuetudinem Manerii, also the Subject may sue here in the Kings Bench for a lesser sum than 40 s. as if 10 s. Costs be given in any Suit here, Suit to such Costs lyeth here in this Court.

Steward.

Mich.

Mich. 30. *and* 31. *Eliz.* In the Kings Bench.

CCCCXLV. Pigot *and* Harringtons *Case.*

PIgot brought a Writ of Error upon a Fine levied by him within age, the Case was, that the Husband and Wife were Tenants for life, the Remainder to the Infant in Fee, and they three levied a Fine, and the Infant onely brought the Writ of Error, It was objected by Tanfield, that they all three ought to joyn in this Writ, and the Husband and Wife ought to be summoned and severed, Atkinson contrary, for here the Husband and Wife have not any cause of action, but the Infant onely is grieved by the Fine, 35 H. 6. 19, 20, 21, &c. In conspiracy against many, it was found for the Plaintiffe, and one of the Defendants brought Attaint, and assigned the false oath in omnibus quæ dixerunt, but afterwards abridged the assignment of the false oath, as to the damages, and so the attaint well lies. Two women are Joint-tenants, they take Husbands, the Husbands and their Wives make a Feoffment in Fee, the Husbands dye, the Wives shall have severall Cui in vita's, for the coverture of the one was not the coverture of the other, 7 H. 4. 112. In Appeal against four, they were outlawed, and two of them brought Error upon it, and good, 29 E. 3. 14. In Assize against three Coparceners, they plead by Bailiff, nul tenent de Franktenement, &c. and found that two of them were disseisors and Tenants, and that the third had nothing, and afterward the three coparceners brought attaint, and after appearrance, the third sister, who was acquit, was nonsuit, and afterwards by award the Writ did abate, Tanfield, Although that the cause be severall, yet the erronious act was joynt, and the receiving of the Fine, and that Record being entire, ought to be pursued accordingly, and then the Husband and Wife shall be summoned and severed, and it is not like to the case of 29 E. 3. cited before, for there the third coparcener had not any cause of attaint, for no verdict passed against her, Wray, As the Error is here assigned, the Writ is well brought, for the Error is not assigned in the Record, but without it in the person of the Infant, and that is the cause of the Action by him and for no other. Two Infants levy a Fine, although they join in Error, yet they ought to assign Errors severally, and they may sue severall Writs of Error, and afterwards it was holden by the Court that the Writ was good, and the Fine reversed as to the Infant onely.

Error.

Attaint.

Fine upon an Infant reversed.

Mich. 30. *and* 31. *Eliz.* In the Kings Bench.

CCCCXLVI. Scovell *and* Cavels *Case.*

IN Ejectione firmæ by Scovell against Cavel, the Declaration was generall upon a Lease made by William Pain, and it was found by speciall verdict, That William Leversedge was seised of the Land, &c. and leased the same to Stephen Cavel, John Cavel, and William Pain, habend. to them for their lives and for the life of the survivor of them; Provided alwayes, and it was covenanted, granted and agreed betwixt the parties, that the said John Cavel, and William Pain, should not take any benefit, profit or commodity of the Land, during the life of Stephen Cavel, and further that the said William Pain should not take any benefit, &c. during the life of John Cavel, &c. Stephen Cavel, died, John Cavel entred, and afterwards William Pain entred, and made the Lease to the Plaintiff, upon whom the Defendant entred; and if the Entry of William Pain were lawfull was the Question,

Leases.

Gawdy

Gawdy Serjeant, his Entry is not lawfull. It will be agreed, That if a man leaſe to three for their lives, they are Joint-tenants, but if by the habendum the eſtate be limited to them by way of Remainder, the joint eſtate in the Premiſes is gone, and the Land demiſed ſhall go in Remainder, and I agree, that in deeds Poll, the words ſhall be taken ſtrong againſt the grantor, contrary in the Caſe of Indentures, the words there ſhall be taken according to the intent of the parties, for there the words are the words of both: See Browning and Beeſtons Caſe 2. and 3. Mi. Ploid. 132. where by Indenture the Leſſee covenanted to render and pay for the Land Leaſed ſuch a Rent, the ſame is a good reſervation, although it be not by apt words, and here in our Caſe, this Proviſo and Covenant, Grant and Agreement doth amount to ſuch a limitation by way of Remainder, eſpecially when ſuch a clauſe followeth immediately after the Habendum, Coke contrary: The Office of the Habendum is to limit and explain the eſtate contained in the premiſes, and here the Habendum hath done its office, and made it a joint eſtate, and therefore the Clauſe afterward comes too late, and in truth is repugnant & utterly void, as to ſuch pur poſe, but perhaps an action of Covenant lies upon it, Wray, It hath been by me adjudged if a Leaſe be made to three Habendum ſucceſſive, the ſame is a void word, and the Leſſees are joint-tenants, contrary of Copyhold by reaſon of Cuſtome, and here the proviſo and the clauſe following, is contrary to the Habendum, and repugnant, and ſo void, as to the dividing of the eſtate by way of Remainder, which Gawdy Juſtice granted, Heale Serjeant, this caſe hath been adjudged, 16 Eliz. A Leaſe to three Habendum to the uſe of the firſt for life, and after to the uſe of the ſecond for life, and after to the uſe of the third for life, the ſame is good, Clench Juſtice, this proviſo follows the Habendum, and is a ſentence to explain the ſentence, Wray, & ſicut, it is another ſentence, although it immediately follows the, Habendum, Clench, if the words had been provided, that although it be limited, (ut ſupra) in the Habendum, ſcil. the firſt named ſhall have the Lands to himſelf for life, &c. it had been good by way of Remainder, Wray, our caſe at Bar, is not that any perſon ſhall take the Remainder, but that any of them ſhall not take the profits during the life of the other. Tanfield took exception to the verdict, becauſe the life of Pain is not found in the verdict, Coke, this is a verdict and no pleading, and the opinion of the Court was, that the verdict was good, notwithſtanding the ſaid Exception, and afterwards Judgement was given for the plaintiff.

Mich 30 *and* 31 *Eliz.* In the Kings Bench.

CCCCXLVII. Hudſon *and* Leighs *Caſe.*

Appeal of Maheim.

RObert Hudſon brought an appeal of Mayhem againſt Robert Leigh for maiming his right hand, and for cutting of his veins and ſinews, which by that means are become dry, ſo as thereby he hath loſt the uſe of his fingers, To which the Defendant pleaded, that heretofore the plaintiffe had brought againſt him an Action of Aſſault and Batterie, and wounding, and therein had Judgement to recover, and Execution was ſued forth by ſcire facias, and ſatisfaction acknowledged upon Record, of 200 Marks aſſeſſed by the Jury for the damages, and 11 l. 10 s. de incremento by the Court, with averment of all identities, Cooper Serjeant, the ſame is a good Bar, and although that an Appeal, and an Action of Treſpaſſe are diverſe Actions in nature, and in many circumſtances, yet as to the recovery of Damages, the one ſhall bind the other, See 38 E. 3. 17. a good caſe. In Treſpaſſe for breaking of his Cloſe and Batterie, the Defendant pleaded, that before that the plaintiff by Bill in the Marſhalſey had recovered his Damages for the

Damages.

ſame

same Trespasse, &c. and vouched the Record, and the Record was sent, the which was varying from the Record pleaded, for the Record vouched, was onely of Batterie without any thing of breaking of the Close: and also the Batterie is layed at another day, &c. and with averment, yet as to the Batterie it was holden good enough with averment, and as to the breaking of the Close the Plaintiffe had Judgement, See 41 E. 3. brev. 548. 12 R. 2. Coronæ 110. and the Case betwixt Rider Plaintiffe and Cobham Defendant, Pasch. 19 Eliz. Rot. 74. it was clearly holden and adjudged, that after a Recovery in Trespasse, an appeal of Mayheim doth not lie, and the book which deceives the Plaintiff is 22 E. 3. 82. where it is said by Thorp, That notwithstanding Recoverie in Appeal of Maheim, yet he may after recover in Trespasse, but Non dicat e contra, Popham contrary, the Plea in Bar is not good, for the Averment is, that the stroke and the wounding supposed in the Writ of Trespasse, and in his Appeal of Maheim are all one, but it is not averred that any damages were given for the Maheim, or that the Maheim was given in Evidence, for it might be, that there was not any Maheim when the Trespasse was brought, but that after by the dying of the wound it became a Maheim, and then the action did rise, as if a man upon a Contract promiseth to pay me 10. l. at Michaelmas, and other 10 l. at Christmas, if he doth not pay the 10 l. at Michaelmas, I may have an Action upon the promise for the not payment of that 10 l. and afterwards I may have another Action and recover damages for the not payment of the 10 l. at Christmas, but if I do not begin any action before Christmas, I cannot recover damages but once for the whole promise and damages shall be given in Evidence, and if I be disseised, I may recover damages for the first Entry, and notwithstanding that I shall have an Assise, and if I do reenter, I shall have Trespasse and recover damages for the mean profits, and the damages recovered for the first Entry shall be recompensed, and the book cited before Fitz. Coronæ 110. doth not make for the Defendant, but rather for the Plaintiff, for there it is averred, that the Maheim was given in Evidence, in the Action of Trespasse, which it is not in our Case, Egerton Sollicitor, we have shewed, That succisio venarum, in this appeal specified is eadem succisio & vulneratio mentioned in the Trespasse, Coke, Although the identity of the wounding and cutting of the veins are averred, yet it is not averred, that the damages recovered in the Trespasse were given for this Maheim, Wray chief Justice, The Jurors are to take consideration of the wound in an action of Trespasse, and to give dammages according to the hurt, and we ought to think that they have done accordingly, and if they have not so done, the party may pray that the Court by inspection would adjudge upon it, and so increase the damages: But now when the Jury hath given great damages, scil. 200 Marks, with which the party hath been contented it should be paid to give the plaintiff another Action, and if there be any such speciall matter, that it was not become a Maheim at the time of the Action of Trespasse brought, but it is become a Maheim of later time by dying, the plaintiffe ought to have shewed the same to the Court, and so have helped himself, for otherwise it shall not be so intended, but that the averment made by the Defendant, is good enough to oust the Plaintiff of this Action, and the Judgement cited 19 Eliz. before was given by me, after I was constituted chief Justice, and this War as I conceive was drawn out of the pleading in 19 Eliz. and afterward Judgement was given against the plaintiff.

Mich.

Mich. 30 & 31 *Eliz.* In the Kings Bench.

CCCCLXVIII. Crosman *and* Reades *Case.*

Intermarriage

De't by Executors.

THe Case was, that I S made his wife his Executrix and dyed, I D being then endebted to the Testator in sixty pounds upon a simple Contract, the Wife Executrix took to Husband the said I D, I D made his Executor and dyed, a Creditor of I S brought an Action of Debt against the Wife Executrix of I S, and upon the pleading, the matter in question was, If by the entermarriage of the wife with the Debtor of the Testator, the same was a Devastavit or not: And if the said Debt of sixty pounds due by I D should be Assets in her hands: And per Curiam, It is no Devastavit, nor Assets, as is supposed: For the woman may have an Action against the Executor of I D: And it was agreed by the Court, that if a man makes his Debtor and a stranger his Executors, and the Debtor dyeth, the surviving Executor may have an Action of debt against the Executor of the Debtor; and so it was adjudged in the principall case.

Mich. 31 & 32 *Eliz.* In the Kings Bench.

CCCCXLIX. Wollman *and* Fies *Case.*

Assumpsit.

IN an Action upon the Case upon Assumpsit that the Plaintiff should enjoy such Lands for so many yeares: The Defendant pleaded the Statute of 13 & 14 Eliz. because the Land is the Glebe Land of such a Parsonage, and in truth the Defendant did misrecite the Statute: For the Statute is, No Lease after the fifteenth day of May: And (the pleading is hereafter to be made) Secondly, the Statute is of any Benefice with cure (the pleading is of any Benefice:) Thirdly, The Statute is, without absence above eighty, and the pleading is (without absence by the space of eighty) dayes: And for these Causes the Plaintiff had Judgment.

Trin 31 *Eliz.* In the Kings Bench.

CCCCL. Frond *and* Batts *Case.*

Debt.

Payment to the wife not good.

IN debt upon a Bond upon condition to stand to the Award of I S; The Defendant pleaded, That the said I S had Arbitrated, that the Defendant should pay to the Plaintiff ten ponnds, and he said he had paid it to the Plaintiffs wife who received it, upon which the Plaintiff did demur: And Judgment was given for the Plaintiff.

CCCCLI. *Trin.* 31. *Eliz.* in the Kings Bench.

Grants of the King of the Office of Marshall of the Kings Bench.

THe Queen granted to George Earle of Shrewsbury, An. 15. of her reign, the office of Earle Marshall of England, and now came the said Earle and prayed, that I S one of his Servants, to whom he had granted the office of Marshall, of the Kings Bench might be to it, because the same is an office incident to his office, and in his power to grant, and that Knowles, to whom the Queen had granted the said office of Marshall of the Kings Bench by the Attainder of North. be removed: And a President was shewed, 14 & 15 Eliz. Betwixt Gawdy and Verney, where it was agreed, That the said

said office was a severall office from the said great office, and not incident to it; And as to the Case of 39 H. 6. 33, 34. the truth is, the said office of Marshall of the Kings Bench was granted expressly by the Duke by expresse words, and so he had it not as incident to his office of Marshall of England: On the other side, there were three Presidents shewed, first in the time of E. 2, That the office of the Marshall of the Kings Bench was appendant to the said office of Marshall of England: Secondly, 8 R. 2. When the said great office was in the King, he granted the said office of Marshall of the Kings Bench: But 20 R. 2. both offices were rejoyned as they were before in ancient time, and there were also shewed Letters Patents of 4 E. 4. and 19 H. 8. by which it appeared, That the said inferiour office had time out of mind been part of the great office; And it was moved, That when the said great office is in the Kings hands, and the King grants the said under office, if now this office be not severed from the great office for ever: Wray, It is no severance, for the cheif office is an office of Dignity, which may remaine in the King, but this under office is an office of necessity, and the King himselfe cannot execute it, by which of necessity he ought to grant it. Another matter was moved, If the Grant of the King unto the Earle of Shrewsbury were good, because in it the Grant to Verney of the said under office, is not recited according to the Statute of 6 H 8. 9. As 26 E. 3. 60. The King seised of the Honor of Pickring, to which a Forrest was appendant, the Bayliwick of which Forrest he granted in fee rendring rent, and afterwards he granted the Honor with Appurtenances, and afterwards the Bayliff committed a Forfeiture, and that was found in Eyre, the Grantee of the Honor shall seize it, yet the King shall have the Rent: And here the Earle of Shrewsbury shall have this office in his power to grant; And so much the rather because it was granted but for life.

Trin. 31 *Eliz.* In the Kings Bench.

CCCCLII. Michill *and* Hores *Case.*

Michil did affirme a Plaint in the Court of the City of Exeter against Hore for twenty pounds, and upon Nihil returned, it was surmised, That Trosse had certaine monies in his hands due to Hore, and according to the custome of Exeter the said monies were attached in the hands of Trosse, who appeared upon the Attachment, and pleaded, That he owed nothing to Hore, upon which there was a Demurrer, and Judgment given against Trosse because that Trosse ought to have pleaded, not only that he owed him nothing, but further that he had not any goods of Hores in his hands: And thereupon Trosse brought a Writ of Error, and assigned the Error in the principall matter, upon which it was demurred, and Judgment given against the Plaintiff, because that the Plea of Trosse (that he owed him nothing) is good enough, for if there be not a Debt, it is not attachable upon such Attachment: And it is a good Plea to a common intent, and altogether in use in London, where such custome is: Another Error was assigned, for that Michill had recovered costs against Trosse, where it ought not to be: And also Judgment is not given, that Trosse should be discharged against Hore; And afterwards, the Judgment given in Exeter was reversed.

Attachment of goods by custome of *Exeter.*

Error.

Pleas.

Mich. 30 & 31 *Eliz.* In the common

CCCCLIII. Dennis *and Saint* Johns *Case.*

Debt. IN Debt upon an Obligation, against Oliver, Saint John, and Alice his wife, as heire of her Father: The Defendants pleaded, Non est factum, of the Father: And it was found by speciall Verdict, That the Obligation was made by the Father of the Wife to the Plaintiff, whereas in truth, The Plaintiff hath declared upon an Obligation made to himselfe only without speaking of any other joynt Obligee, and that the Plaintiff as Survivor hath brought the Action, and if upon the matter it shall be said the Deed of the Defendant in manner as the Plaintiff hath declared, the Jury refer unto the Court: And the case, 14 E. 4. 1. b. If three enfeoff me, and I plead, That two did enfeoff me and the same be traversed, it shall be found against me, for the Feoffment is a joynt act by them all: But if a man enfeoffeth me and two others, and they dye, so as I have all by Survivor, in pleading I may shew the Feoffment was made to me alone: So 46 E. 3. 17. a. Three Joynt-tenants in Fee make a Lease for life, and afterwards two of the Joynt-tenants release to the third, who brings an Action of Waste against the Lessee, and the Writ was, That he held of his lease only, and the Writ was awarded good. Walmesley, This Plea, Non est factum, upon this matter is no good Plea, for he hath not pleaded it Respective as to the Obligation, but generally, Non est factum suum, which refers to the Obligor only, and the Issue is not whether he made the Deed to the Plaintiff or not, but generally whether he made it at all: For there is a difference, Nihil debet, for that refers to the Plaintiff, and where he pleads Non est factum: Which Shuttleworth granted: See 1 Eliz. Dyer, 167. Tawes Case, this Plea Non est factum, hath not any respect to the Obligee, for if the Obligee be a Monk, and be another person who beares the name of the Obligee, yet in those Cases, the Obligor cannot safely plead Non est factum, but where one is sued who beares the name of the Obligor, there Non est factum is a good Plea: And see 10 Eliz. Dyer, 279. W S was bound in an Obligation to one H by the name of I S, and upon that Obligation an action was brought against him by the name of W S, and he pleaded Non est factum, and the speciall matter was found, and it was ruled, that upon that Verdict the Plaintiff should not recover, but the best way for the Plaintiff was, to sue the Defendant by the name by which he is bound, and then if he appeare and plead (ut supra) he shall be concluded by the Obligation: And the Court was clear of opinion, That the Plaintiff ought to have declared upon the speciall matter.

Non est factum.

Hill. 31 *Eliz. Rot.* 1428. In the common Pleas.

CCCCLIV. Willis *and* Whitewoods *Case.*

Leases. THe case was, That A was seised of certain Lands holden in Socage, and leased the same to I S for many years, and dyed, his heire within the age of fourteen years, the wife of A being Guardian in Socage leased the same Land by Indenture to the same I S for years. if the first Lease was surrendred, or determined was the Question: Anderson, Surrendred it cannot be, for the Guardian hath not any Reversion capable of a Surrender, but only an Authority given to her by the Law to take the profits to the use of the heire: But yet perhaps it is determined by consequence and operation of Law: As if A lease to B for one hundred years, and afterwards granteth the

Surrenders.

the Reversion to C for two years, who leaseth to B for two years, who accepts the Lease, the same is not any Surrender, for a terme of one hundred years cannot be drowned in a Reversion for two years, yet the first Lease is determined, which Periam granted: And by Windham, If a Lease be made to begin at Michaelmas, and before that time, the Lessor makes a new Lease to the same Lessee to begin presently, the same is not any Surrender, and yet thereby the first Lease is determined, and so in the principall case, which Anderson granted, but Periam doubted of it, and he said, Guardian in Socage hath such an estate in the Reversion that he may enter for a Condition broken: Anderson, The same is not in respect of any estate that he hath, but in the name and right of the heir, and not by reason of any Reversion.

Trin. 31. *Eliz.* In the common Pleas.

CCCCLV. Norwood *and* Dennis *Case.*

Quare Impedit.

IN a Quare Impedit by Norwood against Dennis, the Issue was, If the Advowsan was appendant to the Mannor of D, or in grosse, and the Jury found that it was appendant, and further found, that the Queen had right, and title to present, for shee had presented at the two last Avoydances, Anderson and Periam Justices, If it appeareth unto the Court upon the pleading, that the King hath title to present, The Court shall award a Writ to the Bishop for the King, but here appeareth no title for the Queen upon the pleading, but only upon the Verdict, so as the one part or the other may answer to it: And because the Jury have found for the Plaintiff, the title found for the Queen shall not be respected, but as a meer Negation and Surplusage, for the same was out of their Issue, and their Charge, and it is no more then if one comes into the Court, and informes us of any title for the Queen, there the Court ought not to regard it.

Trin. 31 *Eliz.* In the common Pleas.

CCCCLVI. Green *and the Hundred of* Buccle-churches *Case.*

Action upon the Statute of Huy and Cry.

IN an action upon the Statute of Huy and Cry, the Case was, That Green did deliver a certain summe of money to a Carryer, who put the same (amongst other things) in his Cart, and sent a boy of the age of twelve years with the Cart before, and he himselfe stayed a short time in the Inne, and afterwards went his way, and before he could get to the Cart the Cart was robbed and the money carryed away: The boy made Huy and Cry, and came unto a Justice of Peace, and prayed that he would examine him, but he would not, but the Carryer himselfe would not goe to be examined, wherefore Green himselfe went to a Justice of Peace to be examined, and so was, and afterwards brought this Action: And it was holden by the Court, that here the Plaintiff had failed of his Action for want of sufficient examination, for the Servant who was robbed ought to be examined, and the examination of the Master or Owner of the goods who was not present at the Robbery is not to any purpose to enable the Plaintiff to this Action, for the party robbed ought to be examined: And it was said by some, That where an action doth not lye upon the new Statute of 27 Eliz. the party may have an action upon the old Statute, but others were against it, for the Statute of 27 Eliz. is in the Negative, so as if the Action doth not lye upon it, no Action lyeth at all: And it was moved by Periam and Anderson, That the Plaintiff might have an Action upon his Case framed upon the said Statute of 27 Eliz. against the Justice of Peace who refused to examine the boy; But Windham doubted of

it, because the Justice of Peace is a Judge of Record, and for such thing as he doth as Judge, no Action lyeth: To which it was answered by Periam and Anderson, That the Examination in such case is not made by him as Judge or Justice of Peace, but as a Minister appointed for the examination by the Statute, &c.

Trin. 31 *Eliz.* In the common Pleas.

CCCCLVII. Stevinsons *Case.*

Debt. IN Debt upon a Bond, the Condition was, That whereas the Plaintiff had covenanted with the Defendant, that it should be lawfull for the Defendant to cut down wood for Fire-boot and Hedge-boot without making any wast, or cutting more then necessary: And the Plaintiff alligned the breach in that Covenant (which is in truth the Covenant of the Plaintiff) that the Defendant had committed wast in felling wood, &c. And the Condition was to performe all Covenants and Agreements: And Exception was taken because that the Condition ought to extend but unto Covenants to be performed on the part of the Lessee, but the Exception was not allowed, for it is the Agreement of the Lessee although it be the Covenant of the Lessor the Plaintiff.

Trin. 31 *Eliz.* In the Kings Bench.

CCCCLVIII. Foster *and* Wilson *against* Mapes.

Covenant. FOster and Wilson brought an action of Covenant against Mapes, and declared, That by certaine Indentures of Articles, it was agreed betwixt the Plaintiff and the Defendant, whereof one part was sealed with the seale of the Defendant, and the other with the seales of the Plaintiffs, that whereas the Defendant had leased to the Plaintiffs the Parsonage of B, he covenanted, That he would keep the Plaintiffs harmlesse concerning the same against one N B: And declared further, That the said N B had entred upon them; And that at the time of the making of the Indentures, he was Parson of B, i. The Defendant had pleaded Non est factum, and it was found by speciall Verdict, That the Defendant sealed one part of the Indentures, and that one of the Plaintiffs only sealed the other part: Exception was taken to the Declaration because there is not set forth in it any sufficient breach, for when the Defendant Covenants to save the Plaintiffs harmeless against B, the same is to be intended of a lawfull Eviction: As in Puttenhams Case, 13 Eliz. Dyer, 306. But if the Covenant had been, That the Lessee should peaceably enjoy the Terme, sine ejectione & interuptione alicujus personæ, upon an unlawfull entry of a wrong doer, an action lyeth: See 16 Eliz. Dyer, 328. And here the finding of N B to be Parson at the time is to no purpose: And there is not layed any expresse title in N B, but only by implication, for it might be that the Parson had leased to the Defendant rendring Rent with clause of re-entry, and the Parson had entred for the Condition broken, and that the Plaintiffs ought to have shewed, and not generally, that he had entred, and that he was Parson: Also it is layed, That N B was Parson at the time of the Entry, but it is not shewed, what Entry, which may be taken, that he was Parson at the time the Plaintiffs entred by virtue of their Lease, and not when the said N B entred upon the Plaintiffs: Also the Plaintiffs have not declared, That they have entred by force of the Lease aforesaid,

aforesaid, and if not, then they cannot be ejected, &c. and then no breach of Covenant, Pudsey contrary, We have declared, that the Personage was demised to us, and that NB being Parson hath entred, and the Record was read. i. That where the Defendant had demised to the Plaintiffes the Parsonage of B. It was agreed, That the Defendant alwayes should keep harmlesse the Plaintiffes and the Premises against NB for and concerning omnibus pertinentiis, &c. Tanfield, The breach is well laid, and the words of the Covenants amount to as much, as if he had said, that he would keep them from all interruption, and the difference is, when the Covenant is generall, i. keep harmlesse, &c. the same doth not extend but to a lawfull interruption, but when it is speciall against such an one, there it extends to any interruption whatsoever, Gawdy Justice conceived, That the breach of Covenant is well laid, i. that NB hath entred upon them, and removed them, and be it by wrong or by Right, the same is a breach, for he hath not kept harmlesse the plantiffs for the premises and profits of them, against NB 2 E.4.15. a Bond was endorsed upon condition, That the Obligor should defend to the Obligee for such a time, such Land whereof he had before enfeoffed him, It was holden, That if a stranger ousteth the Obligee, without any Title, the Bond is forfeited by reason of the word (defend) and although the Plaintiffs have not laid in their Declaration, that they have entred, the same is not materiall; for it is not the point of the action, but the Entry of NB is the cause of the Action, Fennor Justice conceived, That the difference put at the Bar betwixt Generall Covenant and speciall, is good Law, and that in case of such a speciall Covenant interruption without Title gives an Action: but he conceived, that because it is not alledged that the plaintiffes had entred, that there was no breach of Covenant, See 9 Eliz. Dyer 257. Wray, The words of the Covenant do amount to peaceable enjoying during the Term, and so to an interruption without Title, Fennor 18 E.4.27. A is bound to B to save B harmlesse from an Obligation made by the Plaintiff to one R, if R affirm a plaint of Debt against the said Plaintiff upon the said Bond, the Bond of A is forfeit, but here the Plaintiffs cannot be harmed, for they have not entred, Gawdy, The conclusion of the Declaration is, That NB entred upon the profits and removed them, so as they could not take the profits thereof, so it is implied, that the Plaintiffs had entred, and afterwards Judgement was given for the Plaintiff

Trin. 31 *Eliz.* In the Kings Bench.

CCCCLIX. Marshes *Case*.

Error by Executors to reverse an attainder of the Testator.

MArsh, Executor of one Nicholson, brought a Writ of Error to reverse an Outlawrie in Felony had against his Testator, the Error assigned was plain, but it was moved, that this Writ of Error would not lie; Gawdy, The action will well lie, for by this suit the plaintiff intends to reverse, and so undoe the Outlawry, for which cause this matter ought not to be objected against him, for the Executor may have this action as well as the Heir, Fennor Justice, Where the principall reverseth the Attainder, the same shall extend to the accessory. In assise against Tenant and disseisor, each of them may have a Writ of Error, and the reversall by the one shall make void the Record as to both, and he needs not any Garnishment, for by intendment the King is to have all his goods, and the King is alwayes presumed present in this court, quod tota curia concessit, and therefore there needs not any Garnishment by Scire facias, but Wray said, we use in such cases to call the Attorney Generall of the King to know if he can say any thing wherefore the Outlawry should not be reversed. The Error assigned was

was, That the Exigent issued forth into London, and the Sheriffe returned that he had proclaimed the party de com. in com. quousque, &c. where he ought to say de Hustingo in Hustingum and that was holden by the court clearly to be Error, and afterwards at another day it was moved by Coke, That a man attainted of Felony could not make Executors, for he is dead in Law, and as Bracton saith, solus Deus facit Hæredes & homo nominat Executores, and therefore the Heir onely shall have a Writ of Error: also an Executor cannot have a Writ of Error, but onely upon a Judgement given in a personall action, but this Attainder is a thing of a higher nature: as where a woman poysoneth her Husband, the Heir shall not have an Appeal, for Murder is changed into Treason, and that offence is a thing of a higher nature; so this attainder is of a higher nature then in the personalty. Also it may be mischievous to the Heir, for the Executor may forthwith bring and pursue his Writ of Error, by which the Judgement shall be affirmed, and so the Right of the Heir shall be bound, also when Error is brought to reverse an Outlawry of Felony, a scire facias ought to be sued against the Lords mediate and immediate, which cannot be here at the suit of the Executors: also it was found by Enquest of the Coroner, that the Testator fugam fecit, so that thereby if he had been acquitted, he shall lose his goods, and then the Executors have not any reason to bring this Writ of Error, but see 11 H.4. Error 51. That Executors shall have a Writ of Error of an Outlawrie pronounced against their Testator, and if it be reversed they shall have restitution of the goods of the Testator, but it doth not appear there that it was upon an Indictment of Felonie, Altham, As well the Executor as the Heir is a person able for to sue a Writ of Error in such case, as 13 E.4. where a false oath is given against one in assise and dieth, the Heir shall have an attaint for the Land, and the Executor in respect of the damages, Popham Attorney Generall, This Outlawrie is a reall Judgement, therefore the Executor cannot have error uponit, Wray, It is good That this case be considered, for it may be mischievous, for thereby the Executor shall avoid the attainder against the King, and the Lords, Fenner, That cannot be without a scire facias, Gawdy, The Executors shall have this action, and as to that which hath been objected, that the party attainted cannot make Executors, the same is no reason for the Executors do pretend, that their Testator was not lawfully outlawed, and so by this Suit, they do endeavour to take away that disability, and therefore it ought not to be objected against the Executor, and if the Case here be, That the Testator had not lands, but only goods, there is no reason, but that the Executors should have a Writ of Error, otherwise the goods of the Testator should be lost, and it was clearly holden by Wray chief Justice, That the Executor might have and pursue this Writ of Error, the Outlawrie of the Testator notwithstanding; and afterwards the Outlawry was reversed accordingly.

Trin. 31 *Eliz.* In the Kings Bench.

CCCCLX. Trussells *Case.*

Habeas corpus

TRussel was removed out of the Counter of London by Habeas corpus into the Kings Bench: Egerton, The Queens Solicitor moved the Court, that Trussell was a person attainted of felony, & so had not any lands or goods, to satisfie, &c. and also his life was not his own, and upon the Return of the Habeas corpus, it appeared that Trussel was detained in prison for an execution, and for divers actions, and it was the opinion of the Court, That as to the Execution he ought not to be discharged, for then the party should lose his Debt for ever: but as to the other actions, it was the opinion of all the Justices,

Exccutions.

ffices, that Truſſel ought to be diſcharged of them; for a man ſo attainted ought not to be put to anſwer, nor taken in Execution, and ſo are all our books, and they ſaid that they had conferred with the Juſtices of the Common Pleas, and with the Barons of the Exchequer; which were of a contrary opinion in this caſe upon the very matter, and not upon the manner of the pleading, but yet we will diſcharge our conſciences as we have done, for there is not any book againſt us, Egerton ſtetit ſuper ſemitas antiquas, and at laſt it was awarded, That Truſſel ſhould be diſcharged of all actions brought againſt him.

Trin. 31 *Eliz.* In the Kings Bench.

CCCCLXI. Sovers *Caſe.*

SOver and others were endicted upon the Statute of 8 H.6. of forcible Entry, becauſe they had expulſed one A out of his Land, and diſſeiſed the Mayor and Commonalty of London, who were in Reverſion, and the ſame being removed hither, reſtitution was prayed thereupon, and White for the City, who was in Reverſion, and the Leſſor prayed that no Reſtitution might be, for they had let the houſe to another, and that he who had procured this Indictment claimed in by a Cuſtome of London, That the Executor of the laſt Termor ſhould not be put out, if he ſhall give as much for it as any other will, whereas in truth there is not any ſuch Cuſtome, and for that cauſe the Reſtitution was ſtayed, and it was ſaid by the Court, that Reſtitution ſhall be alwayes made to him in the Reverſion, and not to the Leſſee for years, for he who is diſſeiſed ſhall be reſtored, and then the Leſſee may reenter,

Indictments upon Statute 8.H.6.

Reſtitution.

Trin. 31 *Eliz.* In the Kings Bench.

CCCCLXII. Beal *and* Carters *Caſe.*

IN an action of falſe impriſonment, the Defendant juſtified becauſe the Plaintiffe brought a child of the age of ſix years, and not above, into the Pariſh Church of W. & eundem ibidem relinquere voluiſſet, & intendiſſet, without keeping, or nouriſhment, to the danger and deſtruction of the child, & contra pacem, for which the Defendant being Conſtable of the ſaid Pariſh arreſted the Plaintiffe and put him in priſon untill he did agree and promiſe to carry the child from whence it came, upon which the Plaintiff did demurre in Law: It was moved, that the Juſtification was good, for every ſubject might do it, a fortiori a Conſtable, and if in this caſe the child, being ſo expoſed, ſhould be famiſhed for want of nouriſhment, it had been murder as it was holden at Wincheſter before the Lord chief Baron, 20 Eliz. Another Exception was taken to the Plea, becauſe he ſaith (quendam infantem) without naming him, and he ought to ſay, Quendam infantem ignotum, but that Exception was not allowed; another Exception (ibidem relinquere intendiſſet) but he doth not ſay, that he did depart from it, and then his meaning is not traverſable, or iſſueable, or to be tried by Jurors, See 22 E.4.45. Gawdy Juſtice, It was a great offence in the Plaintiff, but the ſame ought to be puniſhed according to Law, but the Conſtable cannot impriſon a ſubject at his pleaſure, but according to Law, i to ſtay him and bring him before a Juſtice of the Peace to be there examined, Wray, If the Defendant had pleaded that he ſtayed the Plaintiff upon that matter, to have brought him before a Juſtice of Peace, it had been a good Plea, Fennor, The

False impriſonment.

juſtifica-

justification had been good, if the Defendant had pleaded, that the Plaintiff refused to carry away the child, so all the Justices were of opinion against the Plea, but they would not give Judgement by reason of the ill example, but they left the parties to compound the matter.

Pasch. 33 *Eliz.* In the Kings Bench.

CCCCLXIII. Cole *and* Walles *Case.*

Ejectione Custodiæ lieth not upon a Copyhold estate.

IN an Ejectione Custodiæ, the Plaintiff declared, that A was seised of the Mannor of D within which Mannor are diverse Copyholds of inheritance, and that the Custome of the Mannor is, that if any Copyholder of inheritance of the said Mannor dieth, his heir within the age of 14 years, that then the Lord of the Mannor might grant the custodie of his body and Lands to whom he pleased, and shewed, that one Clevertie a Copyholder of inheritance of the said Mannor died, his son and heir within the age of 14 years, upon which the Lord of the Mannor committed the custodie of his body and Lands to the Plaintiff, and the Defendant did eject him, and upon not guilty, it was found for the Plaintiff; It was moved in arrest of Judgement, That this Action would not lie upon a Copyhold estate; Quod tota Curia concessit, and yet it was said, that an Ejectione firmæ lieth upon a demise of Copyhold-Land, by Lease of the Copyholder himself, but not upon a demise by the Lord of the Copyhold; Quod fuit concessum, and afterwards the Case was made on the Plaintiffs side, and it was said, that this was but an action upon the Case, in the nature of an Ejectione firmæ, and this interest is not granted by Copy, but entred onely into the Court Roll; so it is not an interest by Copy, but by the Common Law, for the words are, Quod Dominus commisit custodiam, &c. and doth not say in in Curia and afterwards Judgement was given for the Plaintiff.

Trin. 33 *Eliz.* In the Kings Bench.

CCCCLXIV. Bond *and* Bailes *Case.*

Judgement upon a Bond where satisfied before a Statute.

BOnd brought a *Scire facias* against Bailes administrator, of one T B upon a Recovery had against the Intestate, in action of Debt, the Defendant pleaded, That before the said Judgement given, the Testator did acknowledge a Statute Staple to one C. and that the Son was not paid in the life of the Testator nor after, and that they have not in their hands any goods of the Intestate beyond what will satisfie the said Statute, upon which there was a demurrer in Law, and Crook argued, That the Bar is not good, for here is not pleaded any Execution upon the Statute, and then the Judgement, the Statute being things of as high nature; that of which Execution is sued, shall be first sued, and if this action had been brought upon a Bond, the Plea had not been good: for although that Brian saith, 21 E. 4. That Recognizances shall be paid by Executors before Bonds, yet that is to be intended, when a *Scire facias* is to be sued upon it, otherwise not: And 4 H. 6. 8. in a scire facias upon a Judgement, fully administred, at the day of the writ brought is a good plea, by which it appeareth, That the Executors shall pay the Debt upon the Obligation before the Writ brought, it had been good, See 12 E. 3. Executors 73. In a scire facias upon a Judgement in Debt given against the Testator, Enquirie shall be what goods the Executors had the day of the scire facias: and he said, it was moved by Anderson, 20 Eliz. in this Court. In Debt upon a Bond against Executors

fore, the Defendant pleaded, that the Testator was indebted by Judgement to A, and that they had not more, then to satisfie the same, and it was holden no plea, if not that he pleaded further, that a Scire facias was sued upon it: Wray said, The same is not Law, and there is a difference when the Judgement is given against the Testator himself, and where against the Executors, for where Judgements are given against Executors, the Judgement which was given before shall be first executed, but if two Judgements be given against the Testator, he who first sues Execution against the Executors shall be first satisfied, because they are things of equall nature, and before suit, it is in the Election of the Executor, which of them he will pay, See 9 E. 4. 12. As if two men have Tallies out of the Exchequer, he which first offers his Tallie to the officer shall be first paid, but before that, it is in the choice of the officer, which of them shall be first satisfied, and therefore, 19 H. 6. If the Lease enrolled be lost, the Enrollment is not of any effect, and Pasch. 20 Eliz. our very case was moved in the common Pleas, in a Scire facias upon a Judgement given against the Testator, the Executor pleaded, That the Testator had acknowledged a Statute before not satisfied, Ultra que, &c. and it was holden no Plea, for a Statute is but a private and pocket Record, as they called it, and 32 Eliz. betwixt Conny and Barham, the same plea was pleaded, and holden no Plea. Also if this plea should be allowed, great mischiefs would follow: for then no Debts should be satisfied by Executors, for it might be, that the Statute was made for performance of Covenants, which Covenants perhaps shall never be broken: and afterwards Judgement was given for the plaintiff. *Conny and Barhams Case.*

Trin. 32 *Eliz.* In the Kings Bench.

CCCCLXV. Crew *and* Bailes *Case.*

A Writ of Error was brought upon a judgement given in the common pleas, in a Bill of privilege brought by an Attorney of the said Court, upon an Obligation, and upon the said Judgement issued forth processe of Execution, upon which the Defendant was outlawed, and the Error was assigned in this, That upon that Judgement process of outlawrie doth not lie, for Capias is not in the originall Action, and so was the opinion of the whole Court, being upon a Bill of privilege, and the Outlawrie was reversed, and the Error was assigned in the first Judgement, because there were not fifteen dayes betwixt the Teste of the Venire facias, and the return of it, but that was not allowed, for it is helped by the Statute of 18 Eliz. cap. 14. Error. Priviledge.

Trin. 30 *Eliz.* In the Kings Bench.

CCCCLXVI. Wade *and* Presthalls *Case.*

William Wade brought an Action of Debt against Prestball, the Defendant pleaded, That he was attainted of Treason not restored, nor pardoned, and demanded Judgment if he should be put to answer, upon which the Plaintiff did demur; It was argued for the Plaintiff, that the Plea is not good, for the Defendant shall not take benefit of his own wrong: A person attainted gives his goods, he shall not avoid it; A woman takes a Husband, thereby shee hath abated her own Writ: It is true, That a person attainted is a dead man, it is so, as to himselfe, but not as to others, 33 H. 6. a person attainted is murdered, his wife shall have an appeal, so as to all Debt. Plea in disability of himself not allowed.

respects he is not dead, and although as yet the Plaintiff cannot have any Execution against the Defendant, yet here is a possibility to have Execution, if the Defendant get his pardon: As a man shall have warrantia Charta, although he be not impleaded and yet he cannot have execution, but there is a possibility to have execution, 22 E. 3. 19. A Rent granted to one in Fee upon condition, that if the Grantee dye, his heir within age, that the rent shall cease during the nonage, the Grantee dyeth his heire within age, his wife brought Dower presently and recovered, and yet she cannot have execution, but yet there is a possibility to have execution, viz. upon the full age of the heir: Coke, contr. by his Attainder he hath lost his Goods, Lands, life, degree, for he is now become terræ filius, and he cannot draw blood from his Father, nor afford blood to his Son or his posterity, so as he hath neither Auncestor, nor Heire, and as to the possibility, the same is very remote, for the Law doth not intend that he shall be pardoned, and see 6 H. 4. 64. A man committed a Felony, and afterwards committed another Felony, and after is attainted of one of them, he shall not be put to answer to the other, but if he obtaine his Charter of pardon, he shall answer to the other, See also, 10 H. 4. 227. t. Coronæ: Popham Attorney Generall: The Defendant ought to answer, for none shall have advantage of his own wrong: The Plaintiff is made a Knight pendant the Writ, it shall abate, because his own Act, but here Treasons are so heynous, that none shall have ease, benefit or discharge thereby: And if the Defendant shall not be put to answer untill he hath his pardon, then the action is now suspended, and an action personall once suspended is gon for ever, and he cited 29 E. 3. 61. in the Book of Assizes, where it is said by Shard, execution upon a Statute may be sued against a man attainted, and he said, That if the Enemy of the King comes into England, and becomes bounden to a Subject in twenty pounds, he shall be put to answer, notwithstanding that Interest that the King hath in him: Harris Serjeant to the same intent, he conceived by 33 H. 6 1. That Traitors are to answer, for if Traitors breake the Goale, the Goaler shall answer for their escape, for the Goaler hath remedy against them, contrary of the Kings Enemies, and he cited the case of one Burchet, who being attainted of Treason struck another in the Tower, for which notwithstanding his Attainder, he was put to answer: Egerton Solicitor Generall: And he said, That the Action is not suspended, but in as much as every Action is used to recover a thing detained, or to satisfie a wrong, and if it can appeare that the party cannot be satisfied according to his case, he shall not proceed: And in this case, the Plaintiff, if he should obtaine, Judgement could not have execution by the common Law, for he hath no goods, nor by the Statute of Westminster, 2. by Elegit for he hath no Lands, nor by the Statute of 25 E. 3. by his body, for it is at the Kings pleasure, and then to what purpose shall the Plaintiff sue, and it is a generall rule, That in all Actions, where the thing demanded cannot be had, or the person against whom the thing is demanded cannot yeild the thing, that the Writ shall abate: As in a Writ of Annuity by Grantee of an Annuity for years, the terme expireth, the Writ shall abate; Tenant in speciall tail brings Waste, and pendant the Writ, his issue dyeth, the Writ shall abate, &c. 2 E. 4. 1. A man Outlawed of Felony pleaded in disaffirmance of the Outlawry, and yet he was not put to answer untill he had his pardon; and then he shall answer: And as to the case of 33 H. 6. 1. It doth not appeare that the Traitors were attainted, and then there is good remedy enough: And Burchets case, cannot be resembled to our case, for although that by the Attainder the body of the party might be at the Kings pleasure, yet his body may be punished for another offence, for the example of others: And as to Tressels case, who in such case was put to answer, I grant it, for he concluded

Execution against a person attainted.

Burchets case.

Regula.

Abatement of Writ.

cluded Judgment if Action, and ſo admitted him a perſon able to anſwer, and then it could not be a good Plea in Bar: And in Ognells caſe, the return of the Sheriff ſhall bind them, for upon Proces againſt a perſon attainted, they returned Cepi where they ought to have returned the ſpeciall matter without a Cepi, but now this generall returne ſhall bind them, and by that he ſhall be concluded to ſay that the party was not in Execution: And this Plea is not any diſabling of the Defendant, but he informes the Judges that he is not a perſon able to anſwer to the Plaintiff: As in a Precipe quod reddat, the party pleads Non-tenure, the ſame is no diſabling of his perſon, but a ſhewing to the Court that he cannot yeild to the party his demand: A man ſhall not take advantage of his own wrong, i. in the ſame thing in which the wrong is ſuppoſed, or againſt him againſt whom the wrong is ſuppoſed to be done, but in other caſes, he ſhall take advantage of his own wrong, as Littleton, If a Leaſe for life be made, the Remainder over in Fee, and he in the Remainder entreth upon Tenant for life, and diſſeiſeth him, the ſame is a good ſeiſin, upon which he may have a Writ of Right, Littleton, 112. 35 E. 3. Droit, 30. And yet this ſeiſin was by wrong: And there was a Caſe betwixt Marbery and Worrall in the Exchequer, the Leſſor entred upon his Leſſee for life, made a Feoffment in Fee with clauſe of re-entry, the Leſſee re-entred, the Leſſor at the day came upon the Land and demanded the Rent which was not paid, it was holden the ſame is a good demand of the Rent, and yet he is a Treſpaſſor to the Leſſee: And in another Caſe, A man ſhall take advantage of his own wrong, Fitz. N. B. 35. N. An Infant hath an Advowſon by diſcent, the Church becomes void, he who hath Right paramount uſurps, and preſents to the Church and the ſix moneths paſſe, now by this tortious uſurpation, he is remitted, and the Infant out of poſſeſſion and without remedy: And he cited the caſe, 16 H. 7. 10. A Scire facias out of a Fine was brought againſt an Abbot, by which Fine the Predeceſſor of the Abbot granted to find a Preiſt to ſing Maſſe in ſuch a Chappell, &c. and the Abbot pleaded, That the ſaid Chappell was become ruinous and decayed, ſo as no Preiſt could ſing Maſſe there, and it was prayed on the part of the Plaintiff, that for as much as the Covenant is confeſſed that Judgement be given, but that Execution ſhould ceaſe untill the Chappell be re-built, but it was not allowed, for this is a good Bar for the time, and no Judgement ſhall be given, for it ſhall be in vain, for it cannot be executed becauſe there is no Chappell, and it may be the Chappell ſhall never be built againe: And ſo in the principall caſe, &c. It was adjorned.

Caſes where a man ſhal take advantage of his own wrong.

Marbery and *Worralls* caſe.

Trin. 33 *Eliz.* In the Kings Bench.

CCCCLXVII. Knightley *and* Spencers *Caſe*.

IN a Prohibition betwixt Knightley and Spencer, The Caſe was, That Ph. Abbot of Eveſham, and all his Predeceſſors time out of mind, &c. were ſeiſed as well of the Rectory impropriate of B in the County of N and alſo of the Manor of B in the ſame Pariſh, &c. untill the diſſolution of his houſe, and that by reaſon thereof, the ſaid Abbot and all the Predeceſſors had holden the ſaid Manor diſcharged of payment of Tithes, untill the diſſolution, &c. and ſhewed the branch of the Statute of 31 H 8. And that the ſaid Abbot did ſurrender the Poſſeſſions of the ſaid houſe to the King, and that the King held the ſame diſcharged of the payment of Tithes, and that afterwards the King granted unto the anceſtor of Knightley the ſaid Manor, and to the anceſtor of Spencer the ſaid Rectory, and although the Plaintiff ought de jure to hold the ſaid Manor diſcharged of Tythes; yet the Defendant ſued him in the Spirituall Court, &c. To which the Defendant confeſſing

Prohibition.

confessing the Impropriation, pleaded, That the said Abbot was seised, ut supra, but that before the making of the said Statuts of 31 H.8. the said Abbot demised Decimas Rectoriæ prædict. to one *Spencer* for 70 years, who made the Defendant his Executor, and died, and that at the time of the said Demise, and dissolution of the said Abby, one Goodman and others were possessed of the said Manor, untill the year 1585. which was the year before the Suit began in the Spiritnall Court, and that at the time of the dissolution he paid Tithes for it, and now the Plaintiff refuseth to pay, &c. absque hoc, That the Abbot and his Predecessors held the said Manor quit of the payment of Tithes time out of mind, &c. upon which the plaintiff did demur in Law, Cook, for the plaintiff, That this Unity of possession is a discharge within the Statute of 31 H.8. the words of which are, That the King and his assignes, shall have and enjoy the Lands discharged and acquitted of Tithes, as freely as the said Abbot held the same at the day of the dissolution: And see before, whereas divers Abbots, were acquitted and discharged of, and for the payment of Tithes, for the Statute doth not intend a reall discharge, as by composition or such manner, which is not here, but only a suspension, which is not any discharge in Law, & yet in speaking of discharge ordinarily an actuall discharge is understood, As if I be bound by Obligation to discharge one of such a Bond, it is not enough to pay the mony, but I ought to procure an actuall Discharge, where it is put generally, but where it is put secundum quid, as it is here referred to the Dissolution. A suspension is a Discharge intended in the said Statute, but where the Statute is indefinite, there an actuall discharge is understood, but restrained to a time a suspension sufficeth, and truly it is a discharge within the intent of the Statute, for if the Statute shall be intended of an absolute discharge, and a Discharge in Law onely, the Statute had been superfluous, for the Law said so much before, for without such provision, the King and his assigns held discharged from payment of Tithes, But the makers of the Statute knew well enough, That the Abbot might have such discharge by divers means, and it should be infinite for the party interessed to enquire of them all, and therefore they did enact briefly, That if at the time of the dissolution they were in any manner freed of payment of Tithes, the same should be sufficient, and so here is not any wrong unto any, for the Parson had all as he had before, and the same is like to the Case betwixt Wharton and Morley, 7 Eliz. in the Exchequer, the Report of which Mr. Plowden communicated unto me, and it was upon the Statute of 1 E. 6. cap. 14. of Monasteries, That all Grants made to the King by any Provost, Governor, &c. of any Manor, &c. shall be good, &c. and the Case was, That a Prebend of the Church of York surrendred to the King, but the surrender was never enrolled, and yet adjudged good upon the Statute, for if it was a lawfull surrender, the same had been good of it self, without any aid of the Statute, which was made to supply insufficient assurances, and so in one Case for the Case aforesaid, and it should be injurious to drive the Jury to enquire of the manner of the Discharge, if it were by composition upon the foundation, or by dispensation of the Pope, as Cisterarces Templarii: And here the plaintiff hath declared of an impropriation before time of memory. and so before the Councille of Laterane, which was within those 400 years, and 25 Eliz. there was a *Sussex* Case, where the Plaintiff declared as here, but they would not proceed, and see Dyer 10 Eliz. 277. 278. The Prior of S. John hath priviledge from Rome, that he shall not pay Tithes for any Land, quas propriis manibus aut sumptibus excolant, but their Farmers have payed Tithes, and it was holden, that in the hands of the Farmers Tithes should be paid, but after the Term ended, the Patentes should hold discharged, so as the Statute hath a favourable construction upon this point: Now it is to see, if the Lease of the Rectorie by which the Defendant

Unity of possession a discharge of Tithes.

Wharton and *Morleys* Case.

dants claim be good or not, and then admitting, that Tithes are due in this Case, yet if his Lease be void, he shall not have a consultation, especially if it appeareth upon his own shewing, as it was holden in a Hampshire Case betwixt Sutton and Dowze, which see Mich. 25 and 26 Eliz. and in that case the Lease is void, for it was made within a year after the Statute of 31 H.8. the January before, and the Statute in April after, for he hath not averred, that the usuall Rent is reserved, nor that the Land was usually let to farm, for which Leases otherwise made within the year are absolutely void by the said Statute: but it will be objected, That this matter shall come in of our part, and it is sufficient for them to plead the Case, but it is not so, as it was lately agreed in Heydons Case in the Exchequer, where the Case was, That the Warden and Cannons of the College of Otery leased certain Lands to Heydon for years, and he in pleading of his Lease did not shew, that the ancient Rent was reserved, and therefore naught, and so was the opinion of the Justices of the Common pleas, in the Case betwixt the Lord Cromwel, and All-Souls College, upon the Statute of 18 Eliz. cap. 6. upon a branch of it, by which it was provided, that the third part of the Rent reserved upon any Lease, should be paid in corn, &c. and the Leases made to the contrary should be void, and in an Ejectione firmæ, brought upon such Lease, because it was not shewed in the Declaration, that the Corn was reserved according to the Statute, Judgement was arrested, and we need not to plead the Statute, for although the Statute be particular, yet because the King hath interest in it, it shall be holden in Law a generall Act, and the Judges shall take notice of it, although it be not alledged by the party, as it was ruled in the Lord Barckleys Case, 4 Eliz. Plow. 231. but if such Rent was reserved, yet the Lease cannot be good, for the King cannot have his Rent, because it is not incident to the Reversion, nor passeth by the Grant of the Reversion, for it is not a Rent, but rather a sum due by reason of contract, which see 30 Ass. 6. A man leaseth a Hundred, rendring Rent, or grants a Rent out of a Hundred, the same is not a good Rent, but meerly void, for a Hundred is not mannorable, nor can be put in view, nor any Assise lieth of such Rent, See 9 All. 24. and in 20 Eliz. in the case betwixt Corbet and Cleer, the Dean and Chapter of Norwich leased a Parsonage, and common of pasture rendring Rent, 1 E. 6. they surrendred their possessions to the King, and afterwards the King granted the Parsonage, without speaking of the common of pasture, It was holden that the patentee of the parsonage should have all the Rent, and no apportionment should be in respect of the Common, for all the Rent issueth out of the Parsonage, and nothing out of the Common: So here, for Tithes are not an Hereditament, which cannot support a Rent within this Statute, for which cause the Lease is void: Also he said, that the traverse of the Defendant was not well taken, for the Plaintiff hath said, That time out of mind, &c. the Abbot and his Predecessors were seised of the Rectorie and Mannor aforesaid, simul & semel, and ratione inde was discharged, &c. at the time of the dissolution, the Defendant traverseth absque hoc, that the Abbot and his Predecessors held discharged of Tithes time out of mind, &c. which is not good, for he hath traversed our conclusion, for our plea is an argument, wheresoever is unity, time out of mind, &c. there is a discharge of Tithes, but in the Abbot was such an unity, ergo he held discharged of Tithes, as 21 E. 3. 22. In a Præcipe quod reddat, the Tenant saith, that the Land in demand, is parcell of the Mannor of D, which is ancient Demesne, and, &c. to which the Plaintiff saith, That it is Frank fee, and the same was not good, for he denies the Conclusion, but he ought to plead to the nature of the Mannor, that it is not ancient Demesne, or that the Land in demand is not parcell of it. Another matter was, because it is pleaded, fuit in tenura & occupatione of Goodman and others, but he doth not shew by what Title, disseisin or Lease, or other Title, &c.

Sutton and Dowzes Case.

Heydons Case.

Lord Cromwel and All-Souls Case.

Corbes and Cleeres Case.

Buckley

Buckley contrary, And he said, This unity of possession is not any discharge of Tythes by the said Statute, and as to the case cited before, of 3 H. 7. 12. where Tenant in tail of a Rent entreth upon the Tenant of the Land, now is the Rent suspended, and then after when he makes a Feoffment in fee, by that Feoffment the Rent is extinguished which was but suspended at the time of the Feoffment, and therefore some have holden that if after such Entry, he makes a Lease for life of the Land, that his Rent or Seigniory is utterly gon in perpetuum, for by the Livery all passeth out of him, which he said cannot be Law, and so it seemed to Gawdy Justice, Then upon such Feoffment with warranty he could not vouch as of Land discharged of the Rent generally, but as of Land discharged at the time of the Feoffment, with Proces that the suspension is not a discharge, for it was suspended before the Feoffment, and discharged by the Feoffment, and so suspension is not a discharge, a Fortiori in the Case of Tythes, for in the case of common, and rent, although they are suspended, so as they cannot be actually taken, yet they are to some intent in esse: As where Lands holden of other Lords are in the hands of the King for Primer seisin by reason of Prerogative, and during such seisin of the King the Lord gets seisin, the same is a good seisin notwithstanding that it was suspended, so as he could not distrain: And also in Assize of Land, damages as to the Rent out of the Land shall be recompensed, therefore the rent in some sort is in esse, and a multo fortiori, this Tithe, which is a thing of Common Right, shall be in Esse, but goes with the Land, and therefore by unity of possession shall not be suspended; 35 H. 6. he who hath liberty of Warren in the Lands of another entreth into the Land, the Warren is not suspended, nor by Feoffment of the Land is extinct, and in this Case upon the matter, during the unity of possession, the Tithes were paid, although not in specie: also the Abbot had the Tithes, as Parson of B, and the Land as Abbot, and therefore no suspension, for the Tithes were alwayes in esse, although not taken in the manner, as Tithes commonly are, but by way of Retainer, 22 E 4.44. A Writ of Annuity is brought against a Prior, and it appeared, That the Prior and his Successors have used to pay the Annuity as Parson of D, and not as Priors, which Parsonage was appointed to the said Priory time out of mind, and in the Writ, the Defendant was named Prior only, and not Parson, and therefore the Writ was abated, See 14 E.44. 10 H.7.5. In an Action of Waste: So Bracebridges Case, 14 Eliz. Plowd. 420. The Case put by Catiline, If the Parson, Patron and Ordinary make a Lease for years, and afterwards the Lessee becomes there Incumbent, the Term is not extinct, for he hath the Term in his own Right, and the inheritance in the Right of his Church, which see 30 H.8. Dyer 43. A Parson purchaseth, and after leaseth his Parsonage, he himself shall pay Tithes, notwithstanding this unity, and as to the reason of the other side, That if such Discharge of Tithes be not intended by the Statute, but onely a Discharge in Law, the Statute should be in vain, the same is not so, for if the Abbot had been discharged by way of release or composition for the Monasterie being dissolved, the Appropriation had been gone, if it had not been supported by the Statute, and then the Release and composition of no force, and the King should not take advantage of it, but by this Statute, and as to Whartons Case before cited, the same cannot be Law, for it hath been holden upon the Statute of 18 Eliz. of Confirmations, That if an Infant maketh a Lease to the King, the same is not made good by the Statute, for the said Statute extends to imperfections in circumstances, and not in substance. And although the Lease be not good, yet because the matter of the surmise is naught, although our Bar be naught, a Consultation ought to be granted, also our Lease is well pleaded, and if such defect be in it, as hath been objected, the same ought to come in by Plea on the other side, and

A Rent in esse to some purposes, and suspended to other.

it is not like Heydons Case, for there it was found by specall Verdict, nor to Cromwells Case where such defect was in the Declaration, and so no ground of Action, as to the Traverse it is good enough, as if speciall Bastardy be pleaded against one born before the marriage, and so Bastard, the other party shall traverse generally the Bastardy, and not the speciall matter, but for the principall matter, i. this unity of possession, divers rules have been. 5 Eliz. in the Common Pleas, The Case was, An Abbot had a Mannor within the Parish of D, and a Composition was made betwixt the Parson of D, and the said Abbot, that the Parson should have yearly certain Loads of Wood, out of thirty Acres of the said Mannor, for, and in recompence of all the Tithes of Wood there, afterwards the Parsonage was appropriated to the said Abbot, and afterwards the house was dissolved, and the Mannor granted to one, and the Rectory to another, and it was holden, That the portion of Tithes was removed, for he had them, scil. The Mannor and the Tithes in severall Rights, and Manwood Chief Baron, and Periam Justice, to whom a Case depending in the Chancery was referred concerning the discharge of Tithes by unity of possession, delivered their opinions, That such an Unity is not any discharge within the said Statute: It was adjorned.

Mich. 32 *Eliz.* In the Kings Bench.

CCCCLXVIII. Hoskins *and* Stupers *Case*.

IN an Action upon the Case, the Plaintiff declared, That whereas the Plaintiff had sold to the Defendant 1000 couple of Newland Fishes to the use of the Defendant, and in consideration that he should ship, and should bring and carry the adventure of them from Bristoll, in portum of Saint Lucar and should carry back again the value of the said Fish to London or Bristoll secundum usum Mercatorum, The Defendant did promise, that upon the arrivall of the said Fish, in portum of Saint Lucar, he would give to the Plaintiff 112 l. and said, that he arrived with the said Fish, ad portum of Saint Lucar, and that afterwards he arrived with goods of the value of the said Fish, adportam of London, secundum usum Mercatorum. It was holden by all the Judges, that in portum, and ad portum is all one, as the Statute of Wast is, Quod vicecomes accedat ad locum vastatum, yet he ought to enter into the Land: So the Writ of accedas ad Curiam, & in plena Curia recordari facias, &c. Another Exception was, because he declared, That he returned with goods to the value, and doth not say, whose goods they were, but the Exception was not allowed, for these words secundum usum mercatorum imply that they were the goods of the Defendant, Quod fuit concessum per Curiam, and afterwards Judgement was given for the Plaintiff.

Assumpsit.

Exposition of words.

Trin. 32 *Eliz.* In the Kings Bench.

CCCCLXIX. Walgrave *and* Agurs *Case*.

Sir William Walgrave brought an Action upon the Case against Agur. upon these words spoken by the Defendant to a servant of the Plaintiff, It is well known, that I am a true subject, but thou (inuendo the said servant) servest no true subject, and thine own conscience may accuse thee thereof. It was moved in arrest of Judgement, That these words are not actionable, for no slander comes to the Plaintiff thereby, for perhaps the Party served no man, but the Queen, and if the words may receive such sense, which is

Action for scandalous words.

Savage and *Cook's* Case.

is no pregnant proof of infamy, they are not actionable, as in the Case betwixt Savage and Cook, These words; Thou art not the Queens friend, are not actionable, for it might be they were spoken in respect of some ordinary misdemeanours, as in not payment of Subsidies, or the like: Also it is not averred, that the party to whom the words were spoken, was the Plaintiffs servant. Coke, Where a man is touched in the duty of his office, or in the course of life, an Action lieth, although that otherwise the words are not actionable, and here is set forth in the Declaration, That the Plaintiff at the time of the speaking of the said words, was a Justice of Peace, and Sheriff of Suffolk, and Captain of a Troop of 120 Horse to attend the Preservation of the Queens person: So in respect of place & dignity in the Common wealth, as 2 H. 8. The Bishop of Winchester brought an action upon the Statute of Scandal. Magnatum, upon these words, My Lord of Winchester sent for me, and imprisoned me, untill I made a Release to J. S. and in respect of his Place and Dignity the words were holden actionable: and 9 Eliz. Dyer, In an action upon the Case by the Lord Aburgaveny against Wheeler, My Lord of Aburgaveny sent for us, and put some of us into the Coal-house, and some into the Stocks, and me into a place in his house called Little Ease, and the words were holden actionable: So in our Case.

Kinseys Case

Lewes said, It was the Case of one Kinsey; one said to a Bailiff of a Franchise, Thou didst execute false Warrants, without saying, they were falsified by him, adjudged an Action did not lie. Wray Chief Justice, These words in themselves are not actionable, for the Plaintiff might be untrue in small things, which gave no discredit, but the quality of the person of whom they were spoken, may adde weight to them, as to call one Bankrupt generally, no action lieth upon it, but to call a Merchant so is actionable. So to call one Papist, no action lieth for it; But if one calls the Archbishop of Canterbury so, an action will lie, for he is Governour of the Church. Thou art an untrue man to the Queen, gives not an action to an ordinary Subject, but such words spoken of one of the Privy Councell, are actionable. Corrupt man, in themselves are not actionable, but being spoken of a Judge, an action lieth. It was Birchleys Case, an Attorney of this Court, Thou art a corrupt man, and dealest corruptly, and it was adjudged per Curiam, that the words were actionable, for that referres to his calling. Gawdy was of opinion, that the words were actionable of themselves, without respect had to the Quality of the person of whom they were spoken, for the words are particular enough, and to touch him in the duty of a Subject, which is to be faithfull to his naturall Prince, is a great Reproach and Slander. Fennor conceived, that the words were not actionable, VVray, as before, Of themselves they are not actionable, for they are in generall, for if he be indicted of Trespasse, he is not a good Subject.

FINIS.

THE
TABLE
Of the Matters in this Book.

A.

ABatement of Writ, 56, 57. 138. 157. 210. 216. 352. 445. 466.
Action, 216.
Of Assault and Battery, 63.
De bonis Testatoris, 277
Action upon the Case, 199 234 249 263 321.
For taking Toll, 315
For stopping a Way, 319. A Watercourse, 334
Action upon the Case for words, 111 131 173 179 263 469.
Against a Justice of peace for not examining, 456
Action upon Statutes,
Of 27 *Eliz.* of Huy and Cry, 456
Of *Winchester* of Huy and Cry, 72
Of 5 *Eliz. cap.* 9. 166
Of 5 *Ed.* 6. For striking, 337
Of 8 *H.* 6. 382
Acceptance, 176
Of Rent, 348
Account, 17 109 301
By the heire of a Copy-holder 357
Adjornement, 184
Advantage of his own wrong, 466
Admiralty, 144
Administration, 435
Advowson, 84 272 283 289.
Alienation, 6 50
Alien, 61
Amercements, 145 299 327
Amendment, 102 301
Annuity, 292
Appropriations, 49 316
Appeal, 67 447. Of Mayhem doth not lye after a Recovery in Trespasse, 447
Apportionment, 33 429
Appearance, 114. by Attorney, 397
Arbitrament, 37 95 97 137.
Archdeaconry, 442. not a cure of souls *ib.*
Assize, 30 69 343.
Assets, 107 153 154 215 448 306 363 440.
Assignments, 391
Assault and Battery, 63 64 143 169 191.
Attachment upon Prohibition, 151
Attachment upon the custome of *London*, 35 67 268 278
Of Goods, 278 353 452.
Attainder, 27 221 279 466. where it shall lose Dower, *& e contr.* 7
What forfeited by it, 27
Attaint, 377 445
Attornement, 11 75 316 355 397 408.
Attorney, 427. ought to pursue his authority, 427
Assumpsit, 23 55 121 156 80 159 167 168 180 214 217 222 238 240 241 261 303 317 323 340 401 405 410.
Consideration in it, where good, where not, 23 55 80 121 134 156 241 253 261 340.
Upon *Mutuatus*, 214
Averment, 18 2103 85 102 167 285 338 334 379 447.
Not traversable, 18

Superfluous, 21
Not against a Fine or Record, 102 157
Not against Certificate of the Bishop, 285
Of a Feoffment not proved shall not avoid Dower, 431
Avowry, 16 18 56 103 277.
Auditor, 301
Audita Querela, 98 195 196 310 313 421.
A Ward, 95 97 137 194 238 424 443:
Ancient Demesne, 315

B.

BAile, 74
Bailment of Goods to a Carrier, 278
Bargaine and sale, 34 79 120 223 237.
Not so strong as a Livery, 10
Where void, & *e contr*, 17
To the Queen, 40
Of Trees, 321
Bar, 24 30 92 161 170 240 277 429 437 440
Where good in Assize, & *i contr*. 30
Recovery pleaded where no Bar, 70
Ought to be traversed, confessed and avoyded, 102
Where a Fine is no Bar, 297
Baron, & *Feme*, 386
Bill, 32

C.

Charge, 11 418
Covenant, 21 82 120 158 160 170 186 188 211 252 290 339 429 446 458.
Shall not bind Executors, 3
Not supply the defects of words in a Grant, 4
Quod non maritur et, 67
To stand seised to uses, 279
Conspiracy, 146 269
Confirmation, 61 316
Certiorare and certificate, 12 28 69 114 285.
Collation gaines not the Patronage from the King, 307
Challenge, 9 68 112.
Commission repealed, 363
Common, 56 100
Claime, 429
Conditions, 47 97 233 242 311 331 400 409.
Where not bind an Administrator, 6.
Not to alien, not bind Administrator, 6 409
Wbere to the Land, & *e contr*. 6
Shall not avoid an Interest verted, 11
Void, because against Law, 99
Annexed to an use executed to the possession, 409
Request amounts to a Condition, 306
Not to discontinue, 409
Taken strictly, 425
Consultation, 13 27 29 123 127 177 255 411.
Gonusans, 33 64 294.
Conspiracy, 269
Construction of Deeds, 101
Commissioners of Bankrupts, 35
Churchwardens, 248
Copyholds and Copyholders, 1 19 46 70 124 126 128 133 139 237 243 244 365 408.
Admittance, 244 408
Of an Enfant, 128
Forfeited for Felony, 1
Seized for breaking the Lords Decree, 2
Is an estate, 8 128
Shall maintaine *Ejectione firmæ*, 8
Dower of it, & *e contr*. 19
Grantable by the Lord, 70
Within what Statutes, 126
Forfeiture of them, 128
Surrenders of them, 226 250 273 408 309
In extremis, 128 133 243
By one in Prison, 45
Out of Court 309
Corporations, 36 228
Costs, 142 177 444.
Where Damages are given, 382
Covin, 253
Counts, 53 146 212 240 241 453.
Writ generall, count speciall, 307 314 329.
Courts Baron, and Leet, 33 299
Cui in vita, 210
Customes. 143 178 277 315 438.
Taken strictly, 3
Of granting Copy-holds, 70

To take Recognizances, 178
To make By-Laws 270
Of *London* 357 358
To make Reparations 438
Applyed to part of a Town 438
Ad pasturandum, non ad colendum 19

D.

DAmages 41 71 190 197 207 238 247.
Damages, not given in an account 412
No damages for the continuance of a Tre passe without an Entry 416
Debt 20 21 34 37 41 59 73 88 92 95 114 153 186 206 215 229 262 281 306 274 282 290 259 381 384 422 432 434 448 453.
Upon Recognizance 67 178
Upon Arbitrament 97
For *Nomine penæ* 149
Upon an Escape 5
Deeds 164 171 211 237 453.
Construed according to the meaning of the parties 10 101
Of *Dedi.* and *Concessi.* 75
Enrolled, avoided by Averment 257
Demurrer 190
Upon Evidences 286
Demand of Rent 425
Departure 39 120
Deprivation 402
Devastavit 448
Devises 16 42 73 120 154 155 176 187 205 219 230 242 266 293 306 262 383 387 409 436.
Construction of them 1642
To Executors to sell 38 42 78 254
To an use 342
Diminution 28
Distresse 166 478 315 338
Discontinuance of suit 142
Discontinuance of Lands and estate 150 157 172
Discent 154 163
Where it takes away Entry 293
Disseisin 163
Dower 48 71 118 119 187 233 383
Of Gavelkind 83 182 431
Dutchy Lands 307
The Kings prerogative in them 15

E.

Ejectione firmæ 331
not of a Tenement 265
Ejectione Custodiæ lyeth not of a Copyhold estate 463
Elegit 65 247
Election 36 52 67 92 289 342 360.
Enrolement 10
Endowment 13
Enfant 156 297
Entry 46 66 79 163 165 427 446.
For forfeiture 345
Enquiry of damages 197 278
Escape 5 65 145 203 321 274
Estates 150 219 221 297 288 311.
Vested, shall not be divested 345
Essoin 184
Estoppell 122 220 224 286 437.
Error 12 28 52 71 137 207 228 238 245 246 260 452,
By Executors to reverse an Attainder of their Testator 452 278 317 327 328 343 346 363 397 402 412 415 445 365.
By Journeys accounts 28
Upon Outlawry 37
Upon Recovery in Assize 69
In assessing damages 71
For want of Averment 121
Upon a common Recovery 181
To reverse a Fine by an Enfant 445
Evidence 70 192 215 414.
Exchange 386
Executors 78 311 459
Where they shall have Error or other actions 459
Where charged of their own goods 87 121 153.
Renunciation of them 185
Have action, *de bonis testatoris* 278
Execution 65 202 247 460 200 313 378.
Where joynt, where severall 392
Against a person attainted, where not 466
Exception 158 160 79
Extortion 114 327
Extent 366
Extinguishment 15 135 250 56.
Exposition of words and sentences 240 326 439 468.
Of the word (*De*) and *vocat.* 228
Of the word (Terme) 300
Of the word (*Uterque*) 326
Of Statute of 32 and 33 H. 8. 358
Of the Statute of 21 *H. cap.* 19. 413
Examination, who is to be examined upon the Statute of 27 *Eliz.* of

Huy and Cry 456

F.

FAlse impriſonment 462
Feoffments and faits 31 171 172 31 204 256 288.
Per nomen 343
Upon condition 361
Feme covert 166
Fine upon Jurors 181
For Alienation without Licenſe 11 50 113
Not paid by *Non compos mentis* 11
Not payable upon ſetlement by Parliament 113
Poſt Fines 338
Fines levyed 51 66 81 85 102 187 188 297 330.
Where ſhall not binde a Feme covert 386
Reverſed 157 445
Where ſhall be a breach of Condition 409
Levyed by Preſcription 265
By Tenant in taile in Remainder 361
Formedon 105 154
Forgery of falſe Deeds 192
Forfeiture 51 66 84 139 171 297 254 400.
Founder and Foundation 49
Freſh ſuits 72
Fugitives 12

G.

GUardian in ſocage 454
Gavelkind 154 450
Grants 205 433 380
Of Executors of *omnia bona ſua* 351
Grants of the King 12 33 36 49 162 179 237 280 334 338 451 467.
Grants inſufficient in point of Limitation, ſhall not be ſupplyed with ſubſequent words 14

H.

H*Abendum* 13 73 446
Habeas Corpus 93 94 460

I.

INtruſion 12 46 49 223.
Indictments 9 146 337 363 404
Upon the Statute of 8 H. 6. 461
Upon the Statute of 23. of Recuſancy 321 326 322
Upon the Statute of Newes 390
Informations 162
Upon Statute 1 *Eliz.* 405
Upon Statute of 23 *Eliz. cap.* 6. 60
Upon the Statute of Uſury 125 161
Upon the Statute of Maintenance 231 291
Upon Statute of 5 *Eliz.* for Tillage 319
Joynture 44 205
Joynder in action 402 439 445
Iſſue 89 169 192 241
Judgment 89 428
In the Kings Court not defeated by particular cuſtomes 35
Where ſatisfied before a Statute 464
Jurors receive mony doth not make the Verdict void 21
Fined for eating 181
Juſtification 462

K.

KIng not bound to demand Rent 16

L.

LEaſes 44 46 165 198 205 239 274 286 308 316 320 332 391 425 446 454
By Biſhops 77
By Guardian of a Colledge 183
Within the Statute of 13 *Eliz.* 427
Leet 33
Letter of Attorney 427
Livery of ſeiſin 10 48 276 287 349 427
Doth prevent Enrolement 10
Libell in ſpirituall Court 13 127 151 174 175.

M.

MArriage 67 235
in right, and poſſeſſion 67
Mannor 33 289
Miſnoſmer 25 49 183 204 298
In Indictments 337
Where materiall, where not 228
Mittimus 200

Monſtrans

Monstrans de droit 279
Monstrans de faits 427

N.

Non-residency 129
Non-suit. 142
Notice 39 139 141
Nusance 234 318

O.

Obligation 129 132 164 192 214 281
Office of Marshal of the King 451
Of Herald 337
Of Marshall of the Kings Bench 451
Office trove. 27 50 85 223
Outlawry 84 280 108 148 190
Lies not upon a Judgment upon a Bill of Priviledge 465

P.

Partition 33 68 136 283
Payment, where not good to the wife 450
Post Fines 338
Plaint 415
Plenorty, no plea against the King 307
Pleadings 21 84 102 167 169 176 186 211 204 339 47 430 449
Non cepit, where good 47
Nul tiel Record 85 114
Where recovery is no bar 90
Wherein pleading must make a title 58
Non damnificatus 95
Generall and particular 95
Good to common intent 102
Of a Fine 102
Amounts to the generall Issue 251
Of non est factum 257 453
Out of his fee 294
Fully administred 434
In disability where not allowed 466
Property 54
Primer seisin 85 341
Protection 93 258
Priviledge 365
Of exceptions from Juries 287
Of London 384
Plurality 442
Prerogative 11 15
Prescription 14 100 102 143 147 199 249 299 315 336
Words of it 318
In a stranger not Tenant 14
To erect Herdels 14 147
Where shall not bind the King 438
For Common 100
To be a Justice of Peace 143
To levy a Fine not good 265
To distraine for Amerciaments 327
To repair 438 by taking wood in the Lands of another man, *ib.*
Presentation 50 58 84 207
Repealed by the King 218
Passeth not by a Grant of *Bona & Cattalla* 28
By the Bishop who Collates shal not put the King out of possession 307
Premunire 399
Proof 349
Proces 65
Prohibition 123 127 174 175 176 177 208 255 325 336 376 367 318 325 388 411 442 467

Q.

Quare Impedit, 39 50 58 84 85 190 277 213 [illegible] 278 280 284 307 312 284 289 455
Causes of refusall, when good, *& e contr.* 39 312

R.

Rasure of Deeds 381
Ravishment of Ward 152
Refusall of the Bishop 312
Remitter 40 48 85 118 172
Remainder 134 256 266 336
Upon a Contingent 330
Remitter 48
Rediseisin 90
Receipt 105
Retainer 153 320
Return of the Sheriff 65 200 201 202 312 459
Relation 11 355
Of matter of Record 257

Of a Judgment 264
Of an Execution 423
Rents 187 198 209 280 362 441
Reserved upon a Lease of Dutchy Lands 15
To be paid without demand 15
Charge, parcel of a Mannor 18
Cannot issue out of a Right 205
Charge, out of Copyholds 8
Suspended by Entry 240
How to be demanded, and when severally 271 425
In esse to some purposes and suspended to others 467
Reputation 18 33 49
Replication 194 56 102
Reversion 362
Cannot pass without Deed 429
Reservation 25 446
Restitution 461
Request 167 303 389
Repleader 102 114
Replevin 271 393 18 54 56
Revocation 113
Replevin 33 54 56 64 294
Recovery 30
In Assise, where a Bar 30
Vouchee must appear in person 101
Common recovery by an Infant 296

S.

Sales 225
Seals 12 310
Seisin 271 356
In fact and in Law 318
Seisure 12 84 119
Scire facias 58 84 187 402
Where for the King, *& e contr.* 84
Against Executors 84
Upon Audita Querela 195
Summons and Severance 445
Stewards of Mannors and Courts 309 394 444
Statutes
Construction of them 44
Where they ought to be pleaded, where not 427
Supersedeas 189
Sur cui in vita 210
Surrenders 378 385 420 426 454
By the Steward out of Court 309
Vide Copyholds
Amounts to an Attornment 408
Of one Termor to another, not good 420
By Attorney not good 45

T.

Taile 297
Tenant by the Curtesie 233
Tender 88 95
Upon a Mortgage 43
Upon an Award 55
Where it is no revocation of uses 113
Toll 315
Traverse 12 49 53 56 58 68 64 102 213 277 207 304 331 340 429 467
Where the discent, where the dying seised 429
Trespass vi & armis 110
Trover and Conversion 304 305 335
Not against a Feme-covert 433
Tythes 13 25 122 174 175 177 308 325 336 367 380 411 467
In London 25
Become Lay Chattels 29
Jurisdiction of them 76
Claimed by Prescription 76
Discharged by unity 467
Tryall 67 116 148 203 206 255 285 310 413

V.

Variance 175 228 330
Verdict 86 118 181 426
View 30 106 359
Usurpation 58 84 307
Uses 188 288 330
What it is 279 and Declaration of them 279
Not rise out of an use 10
Not out of a possibility 279
Contingent raised 31
Void for want of consideration 279
Limitation of them 279
Raised by Covenant and by Feoffment do differ 279
Suspended, yet the Land devised 345
Contingent shall bind the execution of an estate in possession 345

Executed

Executed to the poſſeſſion 409

W.

Wager of Law 119 229 282
Wardſhip 347
82
Warning
Wills 155 311
Withernam 302
Warrant of Attorney 246
Warranty 252
Waſt 62 79 86 220 282 359
By Ceſtuy que uſe 409
Writ
To the Biſhop 84 85 278 289
Of right 212 236 the manner of proceeding in it 419
Of Enquiry of damages 278

FINIS.

Errata.

P1. l.12 r.where, l. 24.r. by a claimer,p.5.l. 11. r. Enqueſt l.22.add,Plaintiff, p.6. l. 24.r.argued, p. 8. l. 32. r. breach, p. 9. l. 13. r. commiſſion, l. 31. r. Entry properly is, p. 10 l. 4. r.hurt,p.11.l.24,25.r.*ovium*,p.13.l.5.after *W.Rearsby*r.againſt *A.Rearsby*,l.27.r.Accompt,p.14.l. 37.r.perclose, p. 17. l. 39. r, per ſcript. p. 25. l. 25. r. *de* p. 29. l. 15.r. *warrantia*,p.32. l.41.r. point, p. 35. l. 21. r. *ita quod*, p. 50. l. 42. r. trice, p. 53. l.36.39. 46.r. accoupled, p. 61. l. 45. 49.r. *parvum*, p. 65. l. 30. r. *ſecundum*, p. 69. l. 30.r. falſifie, p. 71. l. 2. r.*commiſſus*,p.77. l.33. 49. r. Replication, p. 79. l. 19. r. Defendant, p. 81 l. 12.48.r.agreed,p. 90 l.19.r. triable, p. 104. l. 14. r. title, p. 109. l. 28. r. *parva*, p. 114. l. 25. add not, p. 116. l.2.add not,l. 33. r. he had conferred, p. 118. l. 4. r. by, l. 33. r. layed, p. 124. l. 39 r. againſt, p. 127. l. 13. r. reveſt. p. 129. l. 35. r. licenceth, p. 130. l. 13. r. agreement, p. 134. l.13.adde not,p.140.l. 2. adde, not,p.144.l.19.r.Sheriff,p.150.l.50.r. *miſericordia*,p.155.l.44.r. the, p.158.l.11.r.point,p.159. l.7.r. *Hen.*7.l.44.in *Cant.*p.163.l.9.r.*muros*,p.166.l.43.ad not,p.175.l.13.r.enjoyed,p.176.l.28 r.execution,p.182.l.6 r.inſtitution,p.187.l.8.adde *Cleere*,p.191.l.7 r.as it,p.202.l.38.adde but, p.204.l.24.ad the,l.43.r.leaſe,p.208.l.20.r.to,l.33.*ſecundum*,p.209.l,11.dele died,p.212.l. 23. 45 r. *maſculo*,p,213.l.38.r. releif, p. 215. l. 16. r. five, l. 40. r. Acons,p. 228. l.31. r. in. p.229. l.45 r.ſhee,p.234.l.29.r.title,p.234 l.31.r. the Arch-biſhop,p. 241.l.34.r.*utrumque*,p. 246.l 7.r. *dare*,p.247.l. 18.r.*Scite*,p.249.l.*ult*.adde, ſo,p.248.l.35.r.*ſecundum*,l.8.adde,be,p.250. l 6.r averement,l.4.r.juſtification,p.251.l.49.r.be,p.254 l.16.r.Deviſe,p.258.l.30 rranſpoſe, by and them p. 270.l.6.r. ſued, p.273.l 36.r.ancient,p.278.l.3.r. *Co dell*,p.281.l.25.r.Defendant,p 282.l.3.r. Grants,p.287.l.33.r.point,p,288:l.19 r.for,p.300.l.44.add,for,p.301.l 9.dele not,l.14.r.Towns, p.304.l.2.ad not,l.3.r.diſallowed,p.310.l.15.r.*vie*,p.312.l.26.r.*Roff*.p.313.l.3. r. as, p.318.l.27. r. and Shute,p,319 l.28.r.recowped,l.41.r.hard,p.330.l.37.dele and,p.332, l. 44.r cauſe, p.334. l. 11. r,proofs,l.20.r.recowped.

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